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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 853

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE A. S. KREIDER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1941

CERTIORARI GRANTED APRIL 14, 1941

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

In United States District Court for the Middle District of Pennsylvania

No. 2927—January Term, 1932

THE A. S. KREIDER COMPANY

vs.

UNITED STATES OF AMERICA

Docket entries

1932
Mar. 7—Statement of Plaintiff's demand for judgment for $13,471.18, with interest at the rate of six per cent per annum on $13,120.47 from November 13, 1921, and on $350.71 from September 14, 1921, together with costs of suit and such further relief as this Court shall deem just.
Mar. 14—Affidavit of proof of service of petition.
Mar. 22—Praecipe for appearance of Andrew B. Dunsmore & Joseph B. Jenkins, attorneys for defendant.
May 7—Order extending time for filing answer to July 1, 1932.
May 25—Petition to strike off plaintiff's statement and
May 25—Order granting rule returnable to Argument Court (W).
June 6—Answer to rule.
Oct. 25—Order discharging the rule granted May 25, 1932, and directing that affidavit of defense be filed within fifteen days.
Nov. 5—Affidavit of defense.
Nov. 5—Certified copy of affidavit of defense handed U. S. Attorney.
Nov. 18—Plaintiff's reply.
1935
Jan. 8—Praecipe to place case on the trial list for the Mar. term 1935.
Apr. 25—Praecipe and Order directing case be placed specially on May term trial list, 1935 (W).
May 16—Order placing case on trial list for June term, 1935 (J). (For order see Case 2926.)
Nov. 13—Praecipe to place case on trial list for Dec. term, 1935.
Dec. 18—Witness called, sworn and examined (See List) (For list see Case 2926).
Dec. 18—Defendant's request for a directed verdict.
Dec. 23—Transcript of evidence and
Dec. 23—Order of approval and directing it to be filed (W).
1936
Feb. 3—Petition to withdraw transcript and
Feb. 6—Order authorizing Clerk to mail transcript with exhibits attached to Hause, Evans, Storey & Lick, Esqs.
Feb. 6—To be returned in 10 days (W) (Mailed) Rec'd 5/11/36.
May 9—Plaintiff's proposed findings of fact & conclusions of law.

1936

Aug. 14—Defendant's motion for judgment. Defendant's request for special findings of fact and conclusions of law.

Aug. 14—Brief for the United States.

Aug. 26—Opinion and Order that defendant's motion for judgment is granted, and judgment is directed to be entered in favor of the defendant and against the plaintiff (W). Judgment entered in favor of the defendant, United States of America and against the plaintiff, the A. S. Kreider Co.

Aug. 26—J. S. 6.

Oct. 15—Notice of plaintiff's appeal and proof of service thereon.

Nov. 24—Petition of plaintiff for an appeal and Order allowing an appeal. Bond in sum of $250.00 required (W). Assignments of error. Praecipe for record on appeal and Order authorizing and directing the Clerk of the District Court to mail all original files set forth in the praecipe to the Clerk of the U. S. Circuit Court of Appeals 3rd Circuit (W).

Dec. 2—Bond on appeal and

Dec. 2—Order of approval (W).

Dec. 2—Citation issued (W).

Dec. 3—Copies mailed Donald Horne, Esq.

Dec. 10—Affidavit of service of praecipe and other papers.

Dec. 10—Amended assignment of errors.

Dec. 10—Supplemental praecipe and

Dec. 11—Order that Clerk include in transcript on appeal documents set forth in supplemental praecipe (W). All files returned 3/4/38.

Dec. 11—Copy of citation and affidavit of service thereon.

Dec. 23—Affidavit of service of orders of Court etc. by mailing.

1938

July 28—Mandate from U. S. Circuit Court of Appeals, reversing the judgment of the District Court, cause remanded to the District Court with directions to consider and determine the merits of the controversy.

1939

Dec. 19—Opinion and Order, Judgment is directed to be entered in favor of the plaintiff, and against the defendant, in the sum of $13,471.18, with interest at the rate of six percent on $13,120.47 from November 13, 1921 and on $350.71 from September 14, 1921 (W). Judgment entered in favor of the plaintiff, A. S. Kreider Company and against the defendant, United States of America, in the sum of $13,471.18 with interest at the rate of six per cent on $13,120.47 from November 13, 1921 and on $350.71 from September 14, 1921. Notice of entry of judgment mailed Frederick V. Follmer, United States Attorney.

Dec. 19—J. S. 5 & 6.

1940

Jan. 12—Statement of Marshal's fees & expenses (None).

Mar. 8—Notice of appeal of United States to judgment entered Dec. 19, 1939.

Mar. 8—Copy of notice of appeal mailed Clerk U. S. Circuit Court of Appeals, Phila., Pa. and House, Evans & Baker, Esqs., Harrisburg, Pa.

Apr. 5—Appellant's statement of points.

Apr. 5—Stipulation and agreement of counsel for record on appeal and Order authorizing and directing the Clerk of the District Court to mail all original files to Clerk U. S. Circuit Court of Appeals (W).

Apr. 5—Stipulation and agreement of counsel omitting certain records from record on appeal.

Apr. 8—All files stipulated handed Jos. P. Brennan, Esq., Asst. U. S. Attorney.

Apr. 9—Order extending the time for filing record on appeal and docketing action to June 3, 1940 (W).

Apr. 9—Certified copy of order mailed House, Evans & Baker, Esq., and Clerk U. S. Circuit Court of Appeals, Phila. Pa.

Apr. 16—Government's exhibits Nos. 1 and 2.

Apr. 16—Opinion of U. S. Circuit Court of Appeals, 3rd Circuit, filed May 23, 1938.

4 In United States District Court

[Title omitted.]

Statement of plaintiff's demand

Filed March 7, 1932

The A. S. Kreider Company, plaintiff above named, brings this suit against the United States of America, defendant above named, to recover the sum of $13,471.10, with interest on $13,120.47 from December 15, 1921 and on $350.71 from September 15, 1921, upon a cause whereof the following is a statement:

1. That plaintiff at all times herein mentioned has been and now is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business at Annville, Lebanon County, Pennsylvania.

2. That plaintiff duly filed its income and profits tax return for the calendar year 1920 with Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, on or about March 15, 1921, and paid the taxes shown on said return as follows: To said Ephraim Lederer, Collector, on March 14, 1921, $13,120.50; on June 14, 1921, $13,120.50; to Blakely D. McCaughn, Collector, successor to said Ephraim Lederer, on

September 14, 1921, $13,120.50; and on November 13, 1921, $13,120.47; that said Ephraim Lederer ceased to hold
5 office as Collector of Internal Revenue on July 31, 1921, and has not held said office since that date; that said Blakely D. McCaughn, ceased to hold office as Collector of Internal Revenue on December 31, 1927, and has not held said office since that date.

3. That prior to June 15, 1926, plaintiff filed with the Commissioner of Internal Revenue a waiver of its right to have the taxes due for said taxable year 1920 determined and assessed within five years after the return was filed; that said waiver was conditioned to expire on December 31, 1926, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1924; that the Commissioner of Internal Revenue accepted and executed said waiver.

4. That thereafter and on April 10, 1926, the Commissioner of Internal Revenue sent to plaintiff, by registered mail, a deficiency notice, pursuant to the provisions of section 274 of the Revenue Act of 1926, claiming additional income and profits taxes, for the calendar year 1920 in the sum of $1,362.50, and notifying plaintiff of its right, within sixty days after said date to file an appeal with the United States Board of Tax Appeals for a redetermination of said alleged deficiency; that plaintiff did not file an appeal with the United States Board of Tax Appeals.

5. That thereafter, in July 1926, the Commissioner of Internal Revenue assessed said amount of additional tax, and on July 28, 1926, plaintiff paid the tax, making the total paid for said year $53,844.47.

6. Thereafter, on or about March 23, 1929, within four years after the taxes for 1920 were paid, plaintiff filed with the Commissioner of Internal Revenue its claim for refund, on Treasury Department Form 843, for $53,844.47, overpayment of income and profits taxes for said calendar year 1920, with full statement of the grounds and reasons for refund in detail, and facts and evidence in support thereof.

6 7. That thereafter the Commissioner of Internal Revenue considered said claim for refund, and determined that the taxes for 1920 had been overassessed and overpaid in the sum of $14,833.68, and that the correct amount of income and profits taxes for said year was $39,010.79, whereas plaintiff had been assessed and had paid the sum of $53,844.47.

8. That thereafter, defendant refunded to plaintiff the sum of $1,362.50, but withheld and kept, and still withholds and keeps from plaintiff the balance of said overpayment, in the sum of $13,471.18, although plaintiff has demanded same.

9. This is a suit of a civil nature arising under the internal revenue laws, and authorized by section 24 of the Judicial Code as amended by section 1122, subdivision (a) of the Revenue Act of 1926.

WHEREFORE, plaintiff demands judgment for $13,471.18, with interest at the rate of six per cent per annum, on $13,120.47 from November 13, 1921 and on $350.71 from September 14, 1921, together with costs of suit and such further relief as this Court shall deem just.

(S) DOUGLASS D. STOREY,
(S) RALPH J. BAKER,
Attorneys for Plaintiff.

[*Duly sworn to by D. Robert Kreider, jurat omitted in printing.*]

8 In United States District Court

[Title omitted.]

Affidavit of defense

Filed November 5, 1932

The United States of America, defendant, above-named, and hereinafter called "defendant", has a just, full, true and legal defense to the whole claim of plaintiff, above-named, and hereinafter called "plaintiff", which defense is of the following nature and character, to wit:

1. Admitted.

2. Admitted except that the several dates of payment were respectively as follows: March 15, 1921, June 15, 1921, September 16, 1921, and December 15, 1921, and not as set forth in the Statement of Plaintiff's Demand.

3. Admitted.

4. Admitted.

5. Admitted.

6. Defendant admits that a document designated a claim for refund was filed by plaintiff on or about March 25, 1929, but shows unto the court that the only portion of the taxes for the year 1920, which had been paid by plaintiff within four years prior to the filing of said document, was the sum of $1,362.50, and that said sum of $1,362.50 has been refunded to plaintiff as plaintiff admits in Paragraph 8 of its Statement of Demand;
9 that said document or alleged claim for refund was without force or effect as to any part of the taxes paid by

plaintiff for the year 1920 other than said sum of $1,362.50, and does not meet the conditions precedent which plaintiff must meet in order to institute or maintain this action; that the moneys which plaintiff seeks to recover herein having been paid by plaintiff as taxes for the year 1920, more than four years prior to the filing of said alleged claim for refund, this court is without jurisdiction herein.

7. Defendant admits the averments in Paragraph 7 of Plaintiff's Statement of Demand but shows unto the court that said averments are incomplete in that at the same time and in the same document which showed an overassessment of $14,833.68, the Commissioner of Internal Revenue determined and declared that $13,471.18 were barried from being refunded by the statute of limitations imposed by Congress on refunds of taxes.

8. Defendant admits the averments of Paragraph 8 of Plaintiff's Statement of Demand but shows that said averments are incomplete in that the moneys which plaintiff seeks to recover in this action are barred from recovery by plaintiff or from being refunded by the defendant as hereinbefore set forth.

9. Defendant denies that this suit is authorized by any Section of the laws of the United States, and, on the contrary, shows unto the court that plaintiff is not authorized either to institute or maintain this suit and that this court is without jurisdiction to proceed in this action other than to enter a judgment for the defendant.

(Signed) ANDREW B. DUNSMORE,
United States Attorney.

[*Duly sworn to by Joseph B. Jenkins, jurat omitted in printing.*]

11 In United States District Court

[No. 2927 (title omitted).]

Reply

Filed November 18, 1932

The A. S. Kreider Company, plaintiff herein, answers the affirmative allegations of defendant's Affidavit of Defense, as follows, to wit:

1. Admits the averments of fact in paragraph 2 thereof.

2. Denies that the claim for refund mentioned in paragraph 6 thereof was without force or effect as to any part of the taxes paid by plaintiff for the year 1920, and avers that said claim applies to all income and profits taxes paid by plaintiff for said year 1920, and that this Court has jurisdiction herein.

3. Admits the averments of fact in paragraph 7 of the Affidavit of Defense and avers that the Commissioner of Internal Revenue, in a Certificate of Overassessment delivered to plaintiff in October, 1929, determined an overpayment of income and profits taxes for the year 1920 in the sum of $14,833.68; that he, at said time, refunded to plaintiff the sum of $1,362.50, and withheld, and still withholds, the sum of $13,471.18, stating that refund of said amount was barred by the statute of limitations; that said
12 claim for refund was filed within four years after the tax for 1920 was paid; that said claim was timely as to the entire amount claimed under the provisions of subdivision (g) of section 284 of the Revenue Act of 1926 and was not barred by any statute of limitations.

4. Answering paragraph 8 of the Affidavit of Defense, plaintiff denies that the moneys sought to be recovered in this action are barred from recovery by plaintiff or from being refunded by defendant.

5. Answering paragraph 9 of the Affidavit of Defense, plaintiff denies that plaintiff is not authorized to institute or maintain this action, and denies that this Court is without jurisdiction to proceed herein, and avers that this Court has jurisdiction of this suit and to enter judgment for plaintiff for the amount of its claim with interest and costs.

[*Duly sworn to by D. Robert Kreider jurat omitted in printing.*]

[S] Douglass D. Storey,
[S] Donald Horne,
Attorneys for Plaintiff.

14 In United States District Court

[Title omitted.]

Statement of evidence

Filed December 23, 1935

Now, Wednesday, December 19, 1935, at twelve-fifteen o'clock p. m., the above matter came on for hearing before Honorable A. L. Watson, United States District Judge, without a jury, in Court Room No. 1, Federal Building, Scranton, Pennsylvania.

Appearances

For the Plaintiff: Donald Horne, Esq., Chrysler Bldg., New York, N. Y. Douglas D. Storey, Esq., Telegraph Bldg., Harrisburg, Pa.

For the Defendant: Clarence E. Dawson, Esq., Special Assistant to the Attorney General. Joseph E. Brennan, Esq., Assistant United States Attorney.

15 PLAINTIFF'S EVIDENCE

Offer of pleadings

Mr. Storey. Plaintiff offers in evidence paragraph one of the statement of demand and the corresponding paragraph of the affidavit of defense:

(Statement of Plaintiff's Demand.)

"1. That plaintiff at all times herein mentioned has been and now is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business at Annville, Lebanon County, Pennsylvania."

(Affidavit of Defense.)

"1. Admitted."

Mr. Storey. Plaintiff offers in evidence paragraph two of the statement of demand and the corresponding paragraph of the affidavit of *defense:*

(Statement of Plaintiff's Demand.)

"2. That plaintiff duly filed its income and profits tax return for the calendar year 1920 with Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, on or about March 15, 1921, and paid the taxes shown on said return as follows: To said Ephraim Lederer, Collector, on March 14, 1921, $13,120.50; on June 14, 1921, $13,120.50; to Blakely D. McCaughn, Collector, successor to said Ephraim Lederer, on September 14, 1921, $13,120.50; and on November 13, 1921, $13,120.47; that said Ephraim Lederer ceased to hold office as Collector of Internal Revenue on July 31, 1921, and has not held said office since that date; that said Blakely D. McCaughn, ceased to hold office as Collector of Internal Revenue on December 31, 1927, and has not held said office since that date."

16 (Affidavit of Defense.)

"2. Admitted except that the several dates of payment were respectively as follows: March 15, 1921, June 15, 1921, September 16, 1921, and December 15, 1921, and not as set forth in the Statement of Plaintiff's Demand."

Mr. Storey. The plaintiff offers in evidence paragraph three of the statement of demand and the corresponding paragraph in the affidavit of defense.

Mr. Dawson. No objection.

(Statement of Plaintiff's Demand.)

"3. That prior to June 15, 1926, plaintiff filed with the Commissioner of Internal Revenue a waiver of its right to have the taxes due for said taxable year 1920 determined and assessed within five years after the return was filed; that said waiver was conditioned to expire on December 31, 1926, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1924; that the Commissioner of Internal Revenue accepted and executed said waiver."

(Affidavit of Defense.)

"3. Admitted."

Mr. STOREY: The plaintiff offers paragraph four of the statement of demand and the corresponding paragraph of the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand.)

"4. That thereafter and on April 10, 1926, the Commissioner of Internal Revenue sent to plaintiff, by registered mail, a deficiency notice, pursuant to the provisions of Section 274 of the Revenue Act of 1926, claiming additional income and profits taxes, for the calendar year 1920 in the sum of $1,362.50, and notifying plaintiff of its right, within sixty days after said date to file an appeal with the United States Board of Tax
17 Appeals for a redetermination of said alleged deficiency;
that plaintiff did not file an appeal with the United States Board of Tax Appeals."

(Affidavit of Defense.)

"4. Admitted."

Mr. STOREY. The plaintiff offers paragraph five of the statement of demand and the corresponding paragraph of the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand.)

"5. That thereafter, in July, 1926, the Commissioner of Internal Revenue assessed said amount of additional tax, and on July 26, 1926, plaintiff paid the tax, making the total paid for said year $53,844.47."

(Affidavit of Defense.)

"5. Admitted."

Mr. STOREY. The plaintiff offers paragraph six of the statement of demand and the corresponding paragraph of the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand)

"6. Thereafter, on or about March 23, 1929, within four years after the taxes for 1920 were paid, plaintiff filed with the Commissioner of Internal Revenue its claim for refund, on the Treasury Department Form 843, for $53,844.47, overpayment of income and profits taxes for said calendar year 1920, with full statement of the grounds and reasons for refund in detail, and facts and evidence in support thereof."

(Affidavit of Defense.)

18 "6. Defendant admits that a document designated a claim for refund was filed by plaintiff on or about March 25, 1929, but shows unto the court that the only portion of the taxes for the year 1920, which had been paid by plaintiff within four years prior to the filing of said document, was the sum of $1,362.50, and that said sum of $1,362.50 has been refunded to plaintiff as plaintiff admits in Paragraph 8 of its Statement of Demand; that said document or alleged claim for refund was without force or effect as to any part of the taxes paid by plaintiff for the year 1920 other than said sum of $1,362.50, and does not meet the conditions precedent which plaintiff must meet in order to institute or maintain this action; that the moneys which plaintiff seeks to recover herein having been paid by plaintiff as taxes for the year 1920, more than four years prior to the filing of said alleged claim for refund, this court is without jurisdiction herein."

Mr. Storey. The plaintiff offers paragraph seven of the statement of demand and the corresponding paragraph in the affidavit of defense.

(Statement of Plaintiff's Demand.)

"7. That thereafter the Commissioner of Internal Revenue considered said claim for refund, and determined that the taxes for 1920 had been overassessed and overpaid in the sum of $14,833.68, and that the correct amount of income and profits taxes for the said year was $39,010.79, whereas plaintiff had been assessed and had paid the sum of $53,844.47."

(Affidavit of Defense.)

"7. Defendant admits the averments in Paragraph 7 of Plaintiff's Statement of Demand but shows unto the Court that
19 said averments are incomplete in that at the same time and in the same documen. which showed an overassessment of $14,833.68, the Commissioner of Internal Revenue determined and declared that $13,471.18 were barred from being refunded by the statute of limitations imposed by Congress on refunds of taxes."

Mr. Dawson. No objection.

Mr. Brennan. They are all subject to the objection, for instance, paragraph six, that it isn't the best evidence. We will follow that up.

Mr. Storey. The plaintiff offers paragraph eight of the statement of demand and the corresponding paragraph in the affidavit of defense.

(Statement of Plaintiff's Demand.)

"8. That thereafter, defendant refunded to plaintiff the sum of $1,362.50, but withheld and kept, and still withholds and keeps from plaintiff the balance of said overpayment, in the sum of $13,471.18, although plaintiff has demanded same."

(Affidavit of Defense.)

"8. Defendant admits the averments of Paragraph 8 of Plaintiff's Statement of Demand but shows that said averments are incomplete in that the moneys which plaintiff seeks to recover in this action are barred from recovery by plaintiff or from being refunded by the defendant as hereinbefore set forth."

Mr. Dawson. No objection.

Mr. Storey. The plaintiff rests.

Motion for nonsuit

Mr. Brennan. We move for a non-suit, your Honor.

The Court. Motion denied. Exception for the defendant.

20 DEFENDANT'S EVIDENCE

Offers in evidence

Mr. Dawson. The defendant offers as Defendant's Exhibit No. 1 claim for refund for $53,844.47, income tax for 1920, filed by the plaintiff in this action on or about March 25, 1929.

Mr. Storey. No objection.

Mr. Dawson. Defendant offers in evidence as Defendant's Exhibit No. 2 a certified photostatic copy of certificate of overassessment, allowing $1,362.50 for the year 1920 to the A. S. Kreider Company, plaintiff in this action.

Defendant offers in evidence as Government's Exhibit 3 schedule of overassessment, dated September 9, 1929, No. IT 35778, showing refund of $1,362.50, tax, and interest of $30.39 to the plaintiff in this action.

Mr. Storey. No objection.

(Government's Exhibit No. 3 is a part of Government's Exhibit No. 7, in the case between the same parties, No. 2926 January Term, 1932.)

Mr. Dawson. The defendant rests.

21 I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on

the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ KENNETH L. POLLEY,
Shorthand Reporter.

Order

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

/s/ ALBERT L. WATSON,
District Judge.

30 (Execute separate form for each tax period.)

Claim for ☐ Abatement of tax assessed. ☐ Credit against outstanding assessments. ☒ Refund of taxes illegally collected. ☐ Refund of amounts paid for stamps used in error or excess. Collector's notation: District—. Account number—. Date received—. -------- (Stamp here.) -------------, Collector of Internal Revenue.

Treasury Department, Internal Revenue Service. Form 843—Jan. 1922. Comptroller General U. S. January 18, 1922.

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector: Collector must indicate in block above the kind of claim, except in Income Tax cases. Date received by Administrative Unit ---------- (Stamp here.)

STATE OF PENNSYLVANIA,
County of ----------------, *ss:*

THE A. S. KREIDER CO.,
Annville, Pennsylvania.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged, Shoe Manufacturers. Period: From: Jan. 1, 1920, to: Dec. 31, 1920.

2. Character of assessment or tax ----------. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased, $53,844.47.

4. Reduction of Tax Liability requested (Income and Profits Tax), $------.

5. Amount to be abated, $------.

6. Amount to be refunded (or such greater amount as is legally refundable) $53,844.47.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks). (If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit $------.
11. Unpaid assessment against which credit is asked; period from ------ to ------ $------.

Deponent verily believes that this application should be allowed for the following reasons:

(1) That the Commissioner failed to allow an adequate amount representing wear, tear, exhaustion and/or obsolescence on taxpayer's physical assets; that a fair amount representing such deduction is $65,471.02, and the Commissioner allowed $38,777.22.

(2) That the Commissioner failed to include in taxpayer's invested capital a paid-in surplus in the amount of $430,817.50 which it acquired upon incorporation.

There is attached hereto and made a part of this claim a sworn statement of facts outlining in detail the basis of the contentions as made above.

(Attach additional sheets if necessary.)

(Signed:) THE A. S. KREIDER CO.
By DONALD HORNE
Attorney in Fact.

Sworn to and subscribed before me this 23rd day of March, 1929.

C. G. MUTH,
Notary Public.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

31 Schedule No------ Claim No------

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

NAME OF TAXPAYER.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							$		

77 J. S. MACLAUGHLIN,
Collector of Internal Revenue.

——— ———,
Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	If special tax stamp, state: Period commencing—
					$		

_____ _____,

Collector _____ *District* _____

Schedule Number _____ District _____
Allowed or Rejected Number _____ Nature of tax _____
Claimant _____
Address _____
Examined and submitted for action _____, 19__
Amount claimed __ $_____
Amount allowed __ $_____
Amount rejected __ $_____

_____
_____
_____
Committee on Claims.

Claim examined by _____
Claim approved by _____
Chief of Division.

33 TREASURY DEPARTMENT, BUREAU OF INTERNAL REVENUE, INCOME TAX UNIT

The A. S. Kreider Company, Annville, Pennsylvania, for calendar year 1920

STATEMENT OF FACTS AND BRIEFS IN SUPPORT OF CLAIM FOR REFUND

Statement of Facts

It is contended that the Commissioner in the determination of taxpayer's net income for the said year 1920 erred in that he

failed to allow an adequate deduction representing wear, tear and exhaustion and/or obsolescence on taxpayer's physical assets. The facts upon which taxpayer relies are as follows:

Taxpayer's custom was to deduct depreciation upon no definite basis, usually determining the amount after computing the income for the year, and if such income was substantial would deduct a substantial amount for depreciation. If the income was not substantial the amount of depreciation would likewise be reduced. The inequitable result of this was further aggravated by the fact that taxpayer did not set aside amounts deducted for depreciation in a reserve account but merely
34 reduced the asset each year by the amount of the depreciation taken.

When taxpayer's return was audited for the year 1917 the Revenue Agent changed taxpayer's method to the reserve method, failing, however, to restore the depreciation which had been previously credited to the asset and using the diminished balance for the base on which to determine depreciation.

Subsequently taxpayer had its books examined in this connection and had all its physical assets reconstructed, that is, all reductions on account of depreciation were eliminated and the cumulative cost at the end of each year determined. The depreciation was then recomputed on a straight line basis and all amounts then deducted were set aside in a reserve account, due allowances being made for exhausted assets.

The results of this reconstruction are shown in the exhibits described below, which are attached hereto:

Exhibit No. 1—Schedule of Depreciable Assets, January 1, 1920, to December 31, 1920.

Exhibit No. 2—Schedule of Depreciable Assets and Depreciation Thereon for the Year 1920.

Exhibit No. 3—Schedule of Depreciation Reserve, January 1, 1920, to December 31, 1920.

The net result of this recomputation may be summarized as follows:

35	Depreciation		Increase
	Allowed	Corrected	
Buildings	$8,493.38	$11,313.64	$2,820.26
Machinery	25,306.42	50,705.29	25,398.87
Furniture and fixtures	4,977.42	3,452.09	1,525.33
Total	38,777.22	65,471.02	26,693.80

In view of the above it is contended that taxpayer's net income for said year 1920 should be reduced in the sum of $26,693.80.

The above contentions were submitted to the Bureau for the years 1917, 1918 and 1919, and adjustments were made by the Bureau in this respect in a stipulation dated November 14, 1928, Symbols GC:A:AC, and subsequently approved by the Board of Tax Appeals in its order of redetermination dated November 22, 1928. The figures contained in this brief are merely a continuation of the figures previously submitted and accepted by the Bureau.

In the same proceeding it was determined that a paid-in surplus of $430,817.50 should be added to the invested capital previously determined by the Treasury Department, as shown by the stipulation above referred to and the order of redetermination entered by the Board of Tax Appeals pursuant thereto. This paid-in surplus results from the fact that stock having a par value of $349,745.28 was, in 1915, issued for intangible assets, and that the tangible assets for which stock was issued had a fair market value exceeding the par value of the stock
36 issued therefor by $349,745.28, in accordance with the doctrine of the appeal of St. Louis Screw Company, 2 B. T. A. 649; and the balance of $81,032.22 of paid-in surplus is due to an increase in book values resulting from correcting the depreciation allowances of taxpayer's predecessor corporations. The invested capital adjustment requested is also a mere continuation of the application to 1920 of adjustments already made by the Bureau with respect to the years 1917, 1918 and 1919, amounting to $430,817.50 as at incorporation. It is contended that in the computation of the tax for the said year 1920, the above amount should be included in taxpayer's invested capital.

It is also requested that the Treasury Department in its recomputation make due allowances for the correction of the amount of tax which was prorated on account of the subsequent redetermination of taxpayer's tax for the years 1917, 1918 and 1919.

Respectfully submitted.

THE A. S. KREIDER COMPANY
By A. S. KREIDER,
Its President.

37 STATE OF PENNSYLVANIA,
County of Lebanon, ss:

A. S. Kreider, being first duly sworn, deposes and says that he is the President of The A. S. Kreider Company, a corporation,

petitioner in the above-entitled appeal; that he has read the foregoing Statement of Facts and Brief and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

A. S. Kreider.

Subscribed and sworn to before me this 20th day of March 1929.

C. E. Shenk,
Notary Public.

My Commission expires April 1, 1931.

I prepared the foregoing Statement of Facts and Brief from statements made to me by representatives of the taxpayer and from the official records and other papers and books of the taxpayer, and from which the mathematical computations were made, and I do not, of course, know of my own knowledge that all of the facts stated are true.

Donald Horne,
120 Broadway, New York, New York.

38 **Exhibit No. 1**

The A. S. Kreider Company, schedule of depreciable assets, Jan. 1, 1920, to Dec. 31, 1920

Asset and branch	Balance per books Jan. 1, 1920	Restoration of depreciation credited to asset	Adjustments	Corrected balance	Additions	Balance Dec. 31, 1920
Buildings—Elizabethtown	$59,800.00	$18,145.93		$77,945.93	$10,269.33	$88,215.26
Buildings—Annville	46,500.00	15,635.51	$3,788.00	58,347.51	700.00	59,047.51
Buildings—Middletown	40,505.82	10,121.38		50,627.20		50,627.20
Buildings—Lebanon "Turn"	9,474.96	5,286.60	529.24	14,232.32	72,304.18	86,536.50
Buildings—Lebanon "Welt"	84,107.77	1,078.18		85,185.95		85,185.95
Buildings—Philadelphia	44,899.68	4,245.72		49,145.40		49,145.40
Total	285,288.23	54,513.32	4,317.24	335,484.31	83,273.51	418,757.82
Machinery—Elizabethtown	55,526.18	119,513.52	19,589.70	155,450.00	196.71	155,646.71
Machinery—Annville	22,625.06	89,932.69	10,222.81	102,334.94	5,126.28	97,208.66
Machinery—Middletown	53,377.35	26,338.54		79,715.89	2,536.17	82,252.06
Machinery—Palmyra	15,451.92			15,451.92	36,458.12	51,910.04
Machinery—Lebanon "Turn"	6,595.63	48,331.53	7,398.59	47,578.57	3,446.85	44,131.72
Machinery—Lebanon "Welt"	81,803.52	7,811.38		89,614.90	3,195.34	92,810.24
Total	235,379.66	291,977.66	37,211.10	490,146.22	33,813.21	523,959.43
Furniture and fixtures—Philadelphia	2,795.59	1,582.93		4,378.52	213.69	4,592.21
Furniture and fixtures—Chicago	4,750.32	3,494.48		8,244.80	1,910.61	10,155.41
Furniture and fixtures—St. Louis	5,747.03	2,444.64		8,191.67	738.80	8,930.47
Furniture and fixtures—New York	4,776.87	2,832.59		7,609.46	190.77	7,800.23
Furniture and fixtures—Pittsburgh	1,939.20	1,294.86		3,234.06	77.62	3,311.68
Furniture and fixtures—Boston					2,593.24	2,593.24
Total	20,009.01	11,649.50		31,658.51	5,724.73	37,383.24

39

EXHIBIT No. 2

The A. S. Kreider Co., schedule of depreciable assets and depreciation thereon for the year 1920

	Buildings	Machinery	Furniture and fixtures
Balance Jan. 1, 1920 (per Exhibit 1)	$335,484.31	$490,146.22	$31,658.51
Additions (per Exhibit 1)	83,273.51	33,813.21	5,724.73
Balance Dec. 31, 1920 (per Exhibit 1)	418,757.82	523,959.43	37,383.24
Rate of depreciation	3%	10%	10%
Depreciation on property in place Jan. 1, 1920	$10,064.54	$49,014.62	$3,165.85
Depreciation on additions (½ year)	1,249.10	1,690.67	286.24
Total depreciation	11,313.64	50,705.29	3,452.09

SUMMARY OF DEPRECIATION

Buildings	$11,313.64
Machinery	50,705.29
Furniture and fixtures	3,452.09
Total	65,471.02

40

EXHIBIT No. 3

The A. S. Kreider Co., schedule of depreciation reserve, Jan. 1, 1920, to Dec. 31, 1920

Asset and branch	Balance Jan. 1, 1920	Additions during year	Exhaustion adjustment	Balance Dec. 31, 1920
Buildings:				
Elizabethtown	$23,973.30	$2,492.42		$26,465.72
Annville	21,731.36	1,760.93		23,492.29
Middletown	13,356.90	1,518.82		14,875.72
Lebanon "Turn"	6,062.45	1,511.53		7,573.98
Lebanon "Welt"	10,369.21	2,555.58		12,924.79
Philadelphia	5,254.66	1,474.36		6,729.02
Total	80,747.88	11,313.64		92,061.52
Machinery:				
Elizabethtown	82,145.46	15,554.84	$4,525.73	93,174.57
Annville	61,479.23	9,977.18	7,558.38	63,898.03
Middletown	58,138.12	8,098.40		66,236.52
Palmeira	1,995.60	3,368.10		5,363.70
Lebanon "Turn"	28,051.90	4,585.51	3,490.49	29,146.92
Lebanon "Welt"	26,261.62	9,121.26		35,382.88
Total	258,071.93	50,705.29	15,574.60	293,202.62
Furniture and fixtures:				
Philadelphia	1,266.94	448.54		1,715.48
Chicago	3,031.44	920.01		3,951.45
St. Louis	2,227.39	856.11		3,083.50
New York	2,320.57	770.48		3,091.05
Pittsburgh	1,133.11	327.29		1,460.40
Boston		129.66		129.66
Total	9,979.45	3,452.00		13,431.54

41 TREASURY DEPARTMENT

OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

Certificate of Overassessment

Income Tax Unit. IT: AR: D–8. REH. Number: 2,092,506. Allowed $1,362.50. Schedule No. 35778. Ref. cl. filed 3/25/29.

Received, Aug. 29, 1929, Claims Control Section.

The A. S. KREIDER COMPANY,

Annville, Pennsylvania.

SIRS:

An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the year 1920 indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed:	
Original, Account #422,472	$52,481.97
Additional July 1926, Page 1, Line 5 #2	1,362.50
Total assessment	53,844.47
Correct tax liability	39,010.79
Overassessment	14,833.68
Barred by Statute of Limitations	13,471.18
Overassessment allowable	1,362.50

The adjustments shown in the accompanying schedules 1 to 5, inclusive, disclosing this overassessment of $1,362.50 have been made upon the basis of facts and data now before the Unit in connection with a Revenue Agent's report.

In the determination of this overassessment, the statements made in your claim for the refund of $53,844.47, corporation income and excess profits tax, for 1920, have been given careful consideration. Para OK HW.

This refund (or credit) is made in accordance with the provisions of Section 284 (b) of the Revenue Act of 1926. 4 yr. payt.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

District 1–Pa. 1sh–3. Interest: 257.44.

BUREAU RECORD COPY

Form 7920 sgd. by Commr______ 192.
Form 7920 sgd. by Collr______ 192.
Abated, $______
Overpayment, $______
Refunded, $______
Credited, $______

Action, Stamped; Initials, GRW; Date, 8/31/29.
Record of audit and review:

	Date
Return audited:________________________________	9
Reviewed (Unit): Eversfield____________________	8/20/29
Reviewed: Jno. W. Zimmerman, Review Section__	8/23/29
Approved: H. B. Robinson, Head of Division___	8/23/29
Approved: ____________________________________	______
____	______

Committee.

42 SCHEDULE

IT-A-#35778. The A. S. Kreider Company. Tax. Year, 1920.
(Name of taxpayer)

RECORD OF ASSESSMENTS AND PAYMENTS

Entries to be made by the Collector according to instructions. Show, in the ninth column, by symbols "Pd.", "Ab." or "Cr.", the nature of each entry in the eighth column.

Character of assessment and period covered (income tax)	List	Year	Month	Account No. or		Amount assessed	Paid, abated, or credited		Pd. Ab. Cr.
				Page	Line		Date	Amount	
1920	IT	1921	______	422	472____	$52,481 97	3/15/21	$13,120 50	Pd.
							6/15/21	13,120 50	Pd.
							9/16/21	13,120 50	Pd.
							12/15/21	13,120 47	Pd.
Addl________________	IT	1926	July__	15-C	#2____	1,362 50	7/31/26	1,362 50	Pd.
						Int__30 39	7/31/26	30 39	Pd.
Total______________	______	______	______	________		$53,874 86	Total__	$53,874 86	____

Due date of original tax (for any taxable year) to which overpayment was applied as a credit. Credited to Year 19....					Due date of additional tax (1920 and prior years) to which overpayment was applied as a credit. Credited to Year 19....					Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit. Credited to Year 19....				
			Account No. or					Account No. or					Account No. or	
List	Year	Month	Page	Line	List	Year	Month	Page	Line	List	Year	Month	Page	Line
....	....	....	....	....	....	....	....	....	....	....	....	....	....	....

Amount credited	Due date	Amount credited	Due date	Amount credited	Date of assessment
$........	....	$........	....	$........	....
....	....	....	....	....	....
....	....	....	....	....	....

CALCULATION OF INTEREST ALLOWANCE

(Entries *not* to be made by the Collector)

Dates	$1,362.50 1,889.45			$........			$........			$........		
	Year	Month	Day	Year	Month	Day	Year	Month	Day	Year	Month	Day
1. Date to which interest was computed....	29	9	24	....	....	....	....	....	....	....	....	....
2. Date additional tax assessed........	26	7	31	....	....	....	....	....	....	....	....	....
3. Payment of tax........				....	....	....	....	....	....	....	....	....
4. Interest period........	3	1	24	....	....	....	....	....	....	....	....	....
5. Interest allowance........	$257.44			$........			$........			$........		
6. Total interest........	$........											

Date of computation, 9/24/29.

....,
Interest Examiner.

43 IT: AR: D.
REH.

Statement of Returns Examined and Resulting Tax Liability

RETURNS EXAMINED

Company, The A. S. Kreider Company, Annville, Pennsylvania; year, 1920: form 1120.

TAX LIABILITY

Year, 1920; correct tax liability, $39,010.79; tax previously assessed, $53,844.47; overassessment, $1,362.50.

Full details of the adjustments producing the above-stated results based upon Revenue Agent's recommendations are contained in the attached Schedules 1 to 5, inclusive.

44 THE A. S. KREIDER COMPANY, YEAR ENDED DECEMBER 31, 1920

SCHEDULE 1—NET INCOME

Net income as disclosed by return		$406,750.03
As corrected		381,653.73
Net adjustment		25,096.30
Unallowable deductions and additional income:		
(a) Contributions	$245.00	
(b) Expenses capitalized	200.00	
(c) Taxes	840.00	
(d) Depreciation	312.50	
Total		1,597.50
Nontaxable income and additional deductions:		
(e) Depreciation		26,693.80
Net adjustment as above		25,096.30

SCHEDULE 2—EXPLANATION OF ITEMS CHANGED

(a) Contributions are not allowable deductions from net income.

(b) Adding machine charged to expense is disallowed as deduction from income and restored to capital.

(c) Taxes for the years 1914 to 1918, inclusive, are a liability for those respective years, therefore, are disallowed as a deduction for 1920 the year paid.

(d) Excessive depreciation taken on trucks:

Depreciation allowed 25% of $450.00	$112.50
Depreciation taken	425.00
Difference	312.50

45 (e)

Depreciation as computed in your brief dated March 20, 1929, accepted by the Bureau	$65,471.02
Depreciation taken on return	38,777.22
Adjustment	26,693.80

SCHEDULE 3—INVESTED CAPITAL

Invested capital disclosed by return	$4,213,058.48
As corrected	4,660,573.54
Net additions as explained below	447,515.06

Additions:		
(a) 1916 income tax adjust	$2,225.38	
(b) Paid-in surplus	430,817.50	
(c) Capital expenditure	463.18	
(d) Capital stock sold	280.05	
(e) 1918 stock sold	29,032.06	
(f) 1919 stock sold	12,655.19	
Total additions		475,473.36
Reductions:		
(g) Taxes	$840.00	
(h) Inadmissibles	358.89	
(i) 1917 additional	26,759.41	
Total reductions		27,958.30
Net additions as above		447,515.06

46 SCHEDULE 4—EXPLANATION OF ITEMS CHANGED

(a) Overassessment of $2,225.38 for 1916 allowed, as an addition to invested capital.

(b) Paid-in surplus on the basis of corrected asset values at the date of organization (1915), in accordance with the principle in the appeal of St. Louis Screw Company, 2 B. T. A. 649, is allowed as follows:

Total tangible assets as shown by books paid in to taxpayer upon organization (Brief dated August 1, 1928, Page 2)	$1,260,941.91
Increase in book values at organization due to revision of depreciable asset values (Brief of August 2, 1928)	81,032.22
Total tangibles at organization as adjusted (Brief dated August 2, 1928, erroneously shown as $1,341,934.03)	1,341,974.13
Cash value of intangible assets acquired for stock (Brief dated August 2, 1928)	515,374.26
Total assets acquired for stock	1,857,348.39
Percentage of intangibles to total assets	27.74%
Par value of stock issued at organization	$1,260,941.91
Par value issued for intangibles (27.74%)	349,785.28
Balance issued for tangibles	911,156.63
Total tangible assets at organization as adjusted	1,341,974.13
Paid-in surplus at organization based on adjusted asset values	430,817.50

(c) Capital expenditures charged to expense disallowed as as a deduction.

(d) Common stock sold December 31, 1920, amount $102,500.00 effective one day $102,500.00 × 1/366 average— 280.05

47 (e) 1918 overassessment recommended by Special Advisory Committee.

(f) 1919 Tax adjusted:

Correct tax liability $489,594.96×421448=	206,338.82
Amount deducted in return	218,994.01
Adjustment	12,655.19

(g) Delinquent taxes to Middletown, Pennsylvania for the years 1914 to 1918, inclusive, are a liability.
(h) Inadmissibles $4,660,932.43×000077=________________ 358.89
(i) 1917 deficiency as recommended by Special Advisory Committee.

SCHEDULE 5—COMPUTATION OF TAX, 1920 RATES

Net income, Schedule	$381,653.73
Invested capital, Schedule	4,660,573.54
8% of invested capital	372,845.88
Plus exemption $3,000.00	3,000.00
Total credit	375,845.88

	Income	Credit	Taxable	Rate	Tax
20%	$381,653.73	$375,845.88	$5,807.85	20	$1,161.57

INCOME TAX

Net income taxable year	$381,653.73	
Less: Excess Profits Tax	1,161.57	
Exemption	2,000.00	
Balance taxable at 10%	378,492.16	
Income Tax		$37,849.22
Total Income and Excess Profit Tax		39,010.79
Previously assessed, Account #422,472	$52,481.97	
July, 1926, Page 1, Line 5	1,362.50	
		53,844.47
Overassessment		14,833.68
Barred by Statute of Limitations		13,471.18
Overassessment allowable		1,362.50

48 In United States District Court

[Title omitted.]

Defendant's motion for judgment

Filed August 14, 1936

Comes now the above-named defendant by Fredrick Follmer, United States Attorney, its attorney, and, after the close of the evidence in this case and before the court has considered, decided, or announced any decision herein, respectfully moves the court to enter judgment in favor of the defendant and against the plaintiff dismissing the plaintiff's statement of claim at plaintiff's costs upon the following grounds:

I

Under the pleadings, the evidence, and the undisputed facts in this case, defendant is entitled to judgment herein.

II

The pleadings and the evidence in this case, with every inference of fact that may be drawn therefrom are insufficient in law to warrant a judgment in favor of the plaintiff against this defendant.

III

This suit is barred by Section 1113 (a) of the Revenue Act of 1926 reenacting without change Section 3226 of the Revised Statutes, as amended.

49 Wherefore, By reason of the foregoing, the defendant moves the court for judgment in its favor dismissing the plaintiff's suit at plaintiff's costs, and respectfully requests that exceptions be granted this defendant in the event this motion for judgment is overruled by the court.

Respectfully submitted.

(Signed) Frederick V. Follmer,
United States Attorney.

51 In United States District Court

[Title omitted.]

Opinion and order

August 26, 1936

This suit was brought to recover Internal Revenue Taxes alleged to have been erroneously and illegally assessed and collected.

By an Affidavit of Defense, by a motion for a nonsuit after the Plaintiff rested, by a motion for a directed verdict in favor of the Defendant, and by a motion for judgment in favor of the Defendant and against the Plaintiff after the evidence was all in and before the Court had reached any decision, the Defendant raised the question of the Statute of Limitations.

The Applicable Statute (R. S. sec. 3226, amended, 26 U. S. C. A. sec. 156), provides that "no such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

52 The facts are not seriously in dispute. On March 15, 1921, Plaintiff filed its income tax return for the calendar

year 1920. This return showed income taxes payable in the sum of $52,481.97, which amount was paid in four quarterly installments in the year 1921. Prior to June 15, 1926, Plaintiff filed an income and profits tax waiver, extending the statutory period of limitations for assessment of taxes for 1920 to December 31, 1926. On April 10, 1926, the Commissioner of Internal Revenue advised the Plaintiff by registered mail of a deficiency for this year in the amount of $1,362.50. No appeal was taken to the Board of Tax Appeals, and, on July 10, 1926, the deficiency was assessed. The additional tax of $1,362.50 was paid on or about July 28, 1926. On or about March 25, 1929, the Plaintiff filed a claim for refund for all of the taxes paid for the year 1920. This claim was allowed for the sum of $14,833.68. Thereafter, Defendant refunded to Plaintiff the sum of $1,362.50, and retained the sum of $13,471.18.

The Commissioner of Internal Revenue signed the schedule of overassessment, 35778, on September 9, 1929, and, shortly thereafter, notified Plaintiff of the disallowance of the amount for which this suit is brought. Plaintiff admits such notice was received in October 20, 1929.

The Plaintiff completed the payment of the taxes for 1920 on July 28, 1926. This suit was begun March 7, 1932. It is apparent that this suit was not begun before the expiration of five years from the date of payment of the tax.

53 As the suit was begun more than five years after the tax was paid, the only other provision under which it might be timely is that which permits a suit or proceeding "within two years after the disallowance of a part of such claim to which such suit or proceeding relates." This suit is not timely under this provision. The disallowance was made by the Commissioner on September 9, 1929, when he signed the schedule of overassessment, and the Plaintiff was advised of the disallowance in October 1929. If it is assumed that October 31, 1929 was the date when the disallowance was made, two years after that date would be October 31, 1931. The Plaintiff's suit was not begun until March 7, 1932.

This suit was begun too late, and Defendant's motion for judgment should be granted.

Now, August 26, 1936, Defendant's motion for judgment is granted, and judgment is directed to be entered in favor of the Defendant and against the Plaintiff.

(S) Albert L. Watson,
United States District Judge.

54 In United States District Court

[Title omitted.]

Notice of appeal

Filed October 15, 1936

The A. S. Kreider Company, Plaintiff in the above-entitled action, hereby appeals from the judgment entered in the above entitled proceeding in favor of the Defendant on the 26th day of August, A. D. 1936.

(S) Douglass D. Storey,
Douglass D. Storey,

(S) Donald Horne,
Donald Horne,
Attorneys for Plaintiff.

Harrisburg, Pa., *October 10, 1936.*

55 In United States Circuit Court of Appeals, for the Third Circuit

No. 6295. March Term, 1937

A. S. Kreider Company, plaintiff-appellant

v.

United States of America, defendant-appellee

Upon Appeal From the District Court of the United States for the Middle District of Pennsylvania

Opinion

Filed May 23, 1938

Before Buffington, Thompson, and Biggs, Circuit Judges.

Thompson, Circuit J.: This is an appeal from a judgment of the District Court for the Middle District of Pennsylvania. The taxpayer filed its income and profits tax return for 1920 and 1921 and paid the taxes in quarterly instalments in that year. Waivers filed prior to June 15, 1926, extended the time for assessment of taxes to December 31, 1926. In April 1926 the Commissioner sent a deficiency notice claiming additional income and profits taxes for 1920 in the sum of $1,362.50. In July 1926 the

Commissioner assessed the additional tax which was paid in the same month. In March 1929 the taxpayer filed a claim for refund. In September 1929 the Commissioner filed a schedule of overassessment as follows:

"Tax assessed:

Original, Account No. 422,472	$52,481.97
Additional July 1926, Page 1, Line 5	1,362.50
Total assessment	53,844.47
Correct tax liability	39,010.79
Overassessment	14,833.68
Barred by Statute of Limitations	13,471.18
Overassessment allowable	1,362.50

* * * * *

Certificate of Overassessment:

Number: 2,092,506.
Allowed: $1,362.50.
Schedule No. 35778."

The schedule was received by the taxpayer not later than October 1929 and was accompanied by a check for $1,362.50, with interest. In March 1932 the taxpayer instituted suit to recover $13,471.18, with interest, alleged to have been wrongfully withheld by the United States. At this time the Collectors to whom payments had been made were not in office.

The statute invoked by the taxpayer as authority for this suit, commonly known as the Tucker Act, Paragraph 20, Section 24 of the Judicial Code (28 U. S. C. A. 41 (20)) reads:

"Section 41. The district courts shall have original jurisdiction as follows:

(20) Concurrent with the Court of Claims, of all claims
56 not exceeding $10,000 * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is comenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *"

This statute granted a taxpayer the right to bring suit in the District Courts for tax refunds naming the United States as de-

fendant even though the amount involved exceeded $10,000 if the Collector to whom payments were made was dead or out of office at the time of suit. Although it is conceded that each of the prerequisites to jurisdiction exists in the instant case the defense is that the statutory period for suit had expired. The United States relies upon R. S. 3226 (26 U. S. C. A. 156) which provides:

"No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit such or proceeding relates. * * *"

It is obvious from an examination of the relevant dates that whether we consider November 1921, when the original tax was paid, or July 1926, when the deficiency was assessed and paid, as the date of the last payment, more than five years from the last payment elapsed prior to suit. It is equally obvious that more than two years elapsed from the date of disallowance of the claim for refund.

R. S. 3226, however, has been amended by the Tucker Act, supra, so as to permit six years from the final date of payment as the time within which suit may be commenced, when the suit is against the United States and is brought in the District Court. The suit in the instant case was timely within the six-year statutory period. As was said by Mr. Justice Black in Bates Manufacturing Company v. United States of America, U. S. (opinion filed March 28, 1938):

"The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. We find no support in the background or objective of the Act for a construction under which a claimant's rights would be preserved by filing a petition in the Court of Claims, but would be lost—without additional action—in the District Court."

Inasmuch as the Court below decided the procedural issue without passing upon the merits, the judgment is reversed and the cause remanded to the District Court with directions to consider and determine the merits of the controversy.

57 *Dissenting opinion*

BIGGS, Circuit Judge, (Dissenting): Upon March 15, 1921, the appellant filed its income tax for the calendar year 1920 with the Collector of Internal Revenue for the First District of Pennsylvania. The return so made by the appellant showed income tax due and payable by it in the sum of $52,481.97, which it proceeded to pay in four quarterly instalments.

Before June 15, 1926, the appellant filed an income and profits tax waiver, extending the statutory period of limitations for assessment of taxes for the year 1920, to December 31, 1926.

Upon April 10, 1926, the Commissioner of Internal Revenue informed the appellant in the manner prescribed by law that a deficiency existed in tax paid for the year 1920 in the amount of $1,362.50. Upon July 10, 1926, no appeal having been taken by the appellant to the Board of Tax Appeals, the deficiency was duly assessed by the Commissioner. The amount of the additional tax, viz., $1,362.50, was paid by the appellant upon July 28, 1926; that is to say the appellant completed the payment of taxes for the year 1920 on July 28, 1926. Upon March 25, 1929, the appellant filed a claim for refund for all of the taxes paid for the year 1920, viz., $53,844.47, composed of two items, the $52,481.97 paid in four quarterly instalments and the additional tax paid July 28, 1926, in the sum of $1,362.50.

Upon September 9, 1929, the Commissioner signed a schedule of overassessment showing a "net amount refundable" to the appellant in the sum of $1,362.50, with interest. The certificate of overassessment was duly mailed to the appellant and is set forth in the majority opinion.

A check in the sum of $1,362.50, with interest, accompanied the certificate of overassessment and was received by the appellant at the same time the certificate of overassessment was received.

A comparison of dates makes it evident that, since the suit at bar to recover the sum of $13,741.18, with interest, was commenced on March 7, 1932, and the last payment was made upon July 28, 1926, that more than five years elapsed from the date of the payment of the tax to the date of the commencement of the suit. It also appears that since the day of the issuance of the certificate of overassessment was in September, 1929, and the certificate of overassessment was received by the appellant in October, 1929, that more than two years elapsed from the time of the disallowance of that part of the claim of the appellant here sued for to the date of the suit. The District Judge therefore deemed the statute of limitations imposed by the provisions of R. S. 3226, as reenacted by Section 1113 (a) of the Revenue

Act of 1926, c. 27, 44 Stat. 9,[1] to be applicable, and rendered judgment for the appellee.

The appellant contends, however, that paragraph 20 of Section 24 of the Judicial Code, the Tucker Act (28 U. S. C. A.
58 41 (20)),[2] with its provision for the commencement of actions within six years, governs the action at bar, and that the provisions of Section 3226 of the Revised Statutes, as amended, including the statute of limitations contained therein, heretofore referred to, have no application.

Now the appellant's statement of demand sets forth that the sum of 13,471.18 is due it by reason of the overassessment in the sum of $14,833.68 expressed upon the certificate of overassessment issued by the Commissioner. Of this total, as we have stated heretofore, $1,362.50 was paid to the appellant. The appellant therefore by the very nature of its pleading bases its cause of action upon the record of the certificate of overassessment, and therefore to recover must bring that cause of action within the rule enunciated by the Supreme Court in Bonwit-Teller Company v. United States, 283 U. S. 258; 265; Daube v. United States, 289 U. S. 367, 372; and in Stearns Company v. United States, 291 U. S. 54, 65. See also United States v. Real Estate Savings Bank, 104 U. S. 728, 733; United States v. Kaufman, 96 U. S. 567, 570.

The rule of law applicable to the case at bar to be deduced from the cited cases may be stated in substance as follows: Section 24 (20) of the Judicial Code, the Tucker Act, confers jurisdiction concurrent with the Court of Claims upon the District Courts to

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[1] "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *; but such suit or proceeding may be maintained whether or not such tax, * * * has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of payment of such tax, * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates * * *."

[2] "SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * * * *

"Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced * * *. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made * * *. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

entertain suits for sums not exceeding $10,000, founded upon "any contract, express or implied," with the Government of the United States. Suit therefore may be maintained in a District Court under the provisions of the Tucker Act, if the amount involved does not exceed $10,000, provided the circumstances are such as to import a promise of payment by way of refund of tax by the United States and the acceptance of such refund by the taxpayer. If, however, the amount involved in the suit does exceed $10,000, then suit must be brought in the Court of Claims and may not be brought in a District Court.

The amendment of November 23, 1921, to Section 24 (44 Stat. 121) does not permit a District Court to entertain a suit against the United States unless the suit be of such a nature that it could have been brought against the Collector while he was still in office; that is to say unless the suit is of a personal nature to the Collector. The amendment permits the bringing of only such suits as might have been brought aaginst the Collector if he were still in office. A suit on account stated cannot be brought against a Collector, since a Collector has no power to state an account between the United States and a taxpayer after payment of taxes by the latter or any power to allow a refund to the taxpayer. Moses v. United States, 61 F. (2nd) 791; Otis Elevator Co. v. United States, 18 F. Supp. 87. An examination of the record in the case at bar indicates plainly that the suit brought by the appellant is not such a suit as could have been brought against the Collectors of Internal Revenue for the First District of Pennsylvania, to whom the appellant paid its taxes, even had they
59 remained in office, for the appellant's suit is based upon the certificate of overassessment issued by the Commissioner of Internal Revenue.

This is apparent both from the record of the case and the brief of the appellant. Upon the appellant's brief the following is stated: "The appellant contends that the two-year statute has no application because, in cases where it does apply, the two-year period starts with the date of disallowance of the claim for refund, and in this case the claim for refund was allowed, not disallowed." The appellant, in its statement of demand,[3] relies upon an alleged allowance by the Commissioner of the sum of $14,833.68, as expressed in the certificate of overassessment. An examination of the certificate of overassessment, however, shows that the sum of $13,471.18 was not allowed by the Commissioner. Expressly, it is shown as "barred by statute of limitations."

[3] Paragraph 7 of the Statement of Demand is as follows:
"That thereafter the Commissioner of Internal Revenue considered said claim for refund, and determined that the taxes for 1920 had been overassessed and overpaid in the sum of $14,833.68, and that the correct amount of income and profits taxes for said year was $39,010.79, whereas plaintiff had been assessed and had paid the sum of $53,844.47."

There are therefore two reasons why the appellant cannot maintain its suit at bar. It has pleaded a case based upon an account stated and has failed to prove it. It has brought its action in the wrong court, in the District Court instead of in the Court of Claims, since it seeks to recover more than $10,000 upon an account stated.

The judgment of the court below should be affirmed.

A true Copy:

Teste:

———— ————,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

61 *Mandate from Circuit Court of Appeals*

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America, To the Honorable the Judges of the District Court of the United States for the Middle District of Pennsylvania.

[SEAL]

Filed July 28, 1938

Greeting: Whereas, lately in the District Court of the United States for the Middle District of Pennsylvania, before you or some of you, in a cause between A. S. Kreider Company, plaintiff below (appellant), and United States of America, defendant below (appellee)—No. 2927 January Term, 1932—an order was entered in the said District Court on August 26, 1936, which order is of record in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

62 And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-seven, the said cause came on to be heard before the United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and the cause remanded to the said District Court with directions to consider and determine the merits of the controversy.

Philadelphia,

MAY 23, 1938.

64 In United States District Court for the Middle District of Pennsylvania

No. 2927. January Term, 1932

THE A. S. KREIDER COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Opinion

(Filed December 19, 1939)

This case is now before the Court for determination of Plaintiff's claim on its merits.

The facts in the case are not seriously in dispute and were found by the Court in a prior opinion filed August 26, 1936. The Court now finds the facts specially as follows:

March 15, 1921, the Plaintiff filed its income tax return for the calendar year 1920.

This return showed income taxes payable in the sum of $52,-481.97, which amount was paid in four quarterly installments in the year 1921.

Prior to June 15, 1926, Plaintiff filed an income and profits tax waiver, extending the statutory period of limitations for assessment of taxes for 1920 to December 31, 1926.

April 10, 1926, the Commissioner of Internal Revenue advised the Plaintiff by registered mail of a deficiency for this year in the amount of $1,362.50

65 No appeal was taken to the Board of Tax Appeals, and, on July 10, 1926, the deficiency was assessed.

The additional tax of $1,362.50 was paid on or about July 28, 1926.

On or about March 25, 1929, the Plaintiff filed a claim for refund of part of the taxes paid for the year 1920, $13,471.18 of which was paid in 1921, and $1,362.50 of which was paid in 1926.

The Plaintiff was overassessed in the sum of $1,362.50 paid in 1926, and $13,471.18 paid in 1921.

Thereafter, Defendant refunded to Plaintifl the sum of $1,362.50 paid in 1926, with interest, but did not refund the sum of $13,471.18 paid in 1921.

This action was instituted March 1932 to recover the sum of $13,471.18 with interest, of which $13,120.47 was paid on November 13, 1921, and $350.71 on September 14, 1921.

DISCUSSION

The Circuit Court of Appeals for this circuit has ruled in this case that this action was brought within the period of the statute of limitations and that this Court has jurisdiction. The mandate of the Circuit Court of Appeals directed that the case now be determined on its merits.

Inasmuch as the overassessment is not disputed, the sole question before the Court is whether or not the Commissioner of Internal Revenue correctly ruled that the overassessment was barred by the Statute of Limitations. That portion of the Revenue Act of 1926, c. 27, 44 Stat. 66, which is pertinent to the facts of this case provides as follows:

66 "284 (b). Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim or, if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

(g) If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid."

In the present case, the claim was not filed on or before April 1, 1927, and, therefore, it is governed by the provision of (g) regarding claims filed within four years from the time the tax was paid.

It is the contention of the government that the provision of (g) here involved, is qualified by subdivision (b) (2), and that only that portion of the tax paid within four years of the claim may be recovered. Such is the construction which the Commissioner of Internal Revenue apparently placed upon this act, in view of the fact that he allowed only that amount which had been paid within four years of the filing of Plaintiff's claim.

The Courts have uniformly ruled in cases involving the revenue acts that the time when the tax shall be deemed paid, for the purpose of statutes of limitations, is the date upon which the final payment was made, and the words "the tax" refer to the entire tax and not a portion thereof. Hills vs. U. S. 50 F. (2d) 302; sustained on reargument, 55 F. (2d) 1001; Clarke v. U. S. 69 F. (2d) 748.

67 In Weinburg vs. U. S., 25 F. Supp. 83, the question here presented was decided by the Court of Claims and the Court held that the claimant was limited to that portion of the tax paid within four years of the filing of the claim. The decision of the Court of Claims was based largely upon a report of the Senate Committee which first inserted a provision similar to subdivision (b) (2) of the Act under consideration. That report stated that the committee, by the new provision, intended to prevent the extension of the Statute of Limitations by the payment of a small portion of the tax. However, that report dealt with a different statute and was not directed to the particular provision here involved and cannot be given such force and effect as to controvert the clear provisions of this statute. Furthermore, there was no indication of the committee's intention in cases where the taxpayer has filed a waiver of his rights in favor of the United States. In such case, the committee and Congress may well have felt that additional and exceptional rights should be accorded to the taxpayer. That this is true is indicated by the provision permitting claims for the entire tax to be filed on or before April 1, 1927, for taxes for the taxable year 1920 or 1921. The Weinburg case recognizes the right to recover the entire amount of the overpayment under those circumstances. There is little, if any, reason to assume that Congress did not also intend to permit the recovery of the entire overpayment where a claim was filed within four years from the time of the payment of the last installment of the tax.

That Congress did intend that the entire overpayment be recovered is further evidenced by the fact that subdivision (g) was specifically excepted in its entirety from the provisions of
68 subdivision (b). The enactment of (b) (2) clearly shows that Congress knew that the claimant could recover the entire overpayment whether paid within four years of the filing of the claim or not unless express limitation were inserted. This recognition of the judicial construction of the terms used and the fact that no limitation was placed upon the provisions of (g) indicates that Congress did not intend to limit recovery of claims brought under either alternative of (g).

In Weinburg vs. U. S., supra, the Court, dealing with taxes paid for the taxable year 1917, said: "The only exception which subdivision (g) made to the general rule stated in (b) (1) and (2) with reference to the filing of claims and the making of refunds was that a taxpayer who had filed a waiver of the statute of limitations could obtain a refund of an overpayment for 1917 even though paid more than four years prior to the filing of the claim, if the claim was filed on or before April 1, 1925." I cannot agree with this statement. Subdivision (g) contains two exceptions which are connected by the words "either * * * or" and must be given equal effect. Subdivision (g) provides that claim may be made *either* on or before April 1, 1925, *or* within four years from the time the tax was paid. With such phrasing, the Act clearly sets forth alternate and equal exceptions and to limit one and not the other would be a perversion of the language of the act itself.

Furthermore, if the provision "or within four years from the time the tax was paid," were construed as in the Weinburg case, the provision would thereby be rendered superfluous. Such a result is to be avoided wherever possible under the ordinary rules of statutory construction.

69 CONCLUSIONS OF LAW

Subdivision (g) of section 284 of the Revenue Act of 1926 means that where a waiver in respect of the taxes due for the taxable year 1920 or 1921 has been filed, claims for the refund of all overpayments of tax for the taxable year 1920 or 1921 may be filed either on or before April 1, 1927, or within four years from the time the last installment of the tax was paid, and in either case the entire amount of the overpayments may be recovered whether or not all of the overpayments were made within four years prior to the time the claim was filed.

The Plaintiff is entitled to recover the entire amount of the overassessment paid to the Defendant for the taxable year 1920, and no part thereof is barred by the Statute of Limitations.

The Plaintiff is entitled to judgment against the Defendant in the sum of $13,471.18, with interest at the rate of 6 percent, on $13,120.47 from November 13, 1921 and on $350.71 from September 14, 1921.

Now, December 19, 1939, judgment is directed to be entered in favor of the Plaintiff and against the Defendant in the sum of $13,471.18, with interest at the rate of six percent. on $13,120.47 from November 13, 1921, and on $350.71 from September 14, 1921.

[S] ALBERT L. WATSON,
United States District Judge.

70 In District Court of the United States for the Middle District of Pennsylvania

No. 2927. January Term, 1932

THE A. S. KREIDER COMPANY

vs.

UNITED STATES OF AMERICA

Judgment

Clerk's Docket Entry of December 19, 1939

1939
Dec. 19—Opinion and
Order, Judgment is directed to be entered in favor of the plaintiff, and against the defendant in the sum of $13,471.18 with interest at the rate of six percent on $13,120.47 from November 13, 1921 and on $350.71 from September 14, 1921. (W) Judgment entered in favor of the plaintiff, A. S. Kreider Company and against the defendant, United States of America, in the sum of $13,471.18, with interest at the rate of six percent on $13,120.47 from November 13, 1921 and on $350.71 from September 14, 1921.
Notice of entry of judgment mailed Frederick V. Follmer, United States Attorney.

71 In United States District Court

[Title omitted.]

Notice of appeal

Filed March 8, 1940

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the following judgment:

Now, December 19, 1939, judgment is directed to be entered in favor of the plaintiff and against the defendant, in the sum of $13,471.18 with interest at the rate of 6% on $13,120.47 from November 13, 1921, and on $350.71 from September 14, 1921.

(Signed) ALBERT L. WATSON,
United States District Judge.

entered in this action on December 19, 1939.

[S] FREDERICK V. FOLLMER,
United States Attorney,
424 Federal Building, Scranton, Penna.

72 In United States Circuit Court of Appeals for the Third Circuit

No. —

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

v.

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

Appellant's statement of points

Filed April 5, 1940

Comes now the United States of America by Frederick V. Follmer, United States Attorney, defendant-appellant in the above-entitled cause, and with its appeal from the District Court's order for a judgment in favor of the plaintiff states and files the following points upon which it relies to reverse the said judgment:

1. The plaintiff's suit was barred by the statute of limitations.
2. Plaintiff's claim for refund was not filed in time to permit the refund of the taxes ordered refunded by the judgment of the District Court.
3. The District Court was without jurisdiction to hear and determine this suit.
4. The District Court erred in failing to dismiss this suit at the cost of the plaintiff.

(Signed) FREDERICK V. FOLLMER,
United States Attorney.
By JOSEPH S. SHERMAN,
Assistant United States Attorney.

Filed ____________________, 1940.

____
Clerk.

73 In United States District Court

[Title omitted.]

Appellant's designation of contents of record

Comes now the United States of America, defendant herein, by Frederick V. Follmer, United States Attorney for the Middle District of Pennsylvania, and designates that the complete record

and all of the proceedings and evidence in the District Court in this action be included and contained in the record on appeal.

Dated at Scranton, Pennsylvania, this 5th day of April 1940.

FREDERICK V. FOLLMER,
United States Attorney,
Attorney for Appellant.

Received a copy of the foregoing designation of record this 30th day of March 1940.

(Signed) DONALD HOWE,
(Signed) DOUGLAS D. STOREY,
Attorneys for the Appellee.

74 In United States District Court

[Title omitted.]

Stipulation as to record

Filed April 5, 1940

Now, March 30, 1940, it is stipulated and agreed by and between counsel for the Appellant and Appellee in the above matter, which has been appealed to the Circuit Court of Appeals of the United States for the Third Circuit, that the following be omitted from the printed record on this Appeal:

1. Petition for appeal;
2. order allowing appeal;
3. assignment of errors;
4. amended assignment of errors;
5. citation;
6. praecipe, order and supplemental praecipe and order.

(Signed) DOUGLAS D. STOREY,
(Signed) DONALD HOWE,
Attorney for the A. S. Kreider Company,
Plaintiff, Appellee.
(Signed) FREDERICK V. FOLLMER,
United States Attorney,
Attorney for Defendant, Appellant.

75 [Clerk's certificate to foregoing transcript omitted in printing.]

76 In United States Circuit Court of Appeals for the Third Circuit

No. 7375. October Term, 1940

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Minute entry of hearing

And afterwards, to wit, the 25th day of October 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable William Clark, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of December 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

77 In United States Circuit Court of Appeals for the Third Circuit

No. 7375. October Term, 1940

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal From the District Court of the United States for the Middle District of Pennsylvania

Opinion

Filed December 17, 1940

Before CLARK, JONES, and GOODRICH, Circuit Judges.

JONES, Circuit Judge. The plaintiff filed suit in the District Court against the United States to recover an overpayment of income taxes for the year 1920 which had theretofore been

determined by the Commissioner of Internal Revenue but had been withheld by him from certification for refund on the ground that the taxpayer's claim was filed belatedly.

By its affidavit of defense and various motions for summary judgment, the defendant asserted that the suit was barred by the statute of limitations and that the District Court was also without jurisdiction by reason of Section 3226 of the Re-
78 vised Statutes.[1] The District Court, concluding that the suit had been instituted too late, entered judgment for the defendant. An appeal followed and this court then held, one judge dissenting, that Sec. 3226 R. S. was impliedly amended by the Tucker Act (Judicial Code, Sec. 24, par. (20)[2]) "so as to permit six years from the final date of payment as the time within which suit may be commenced, when the suit is against the United States and is brought in the District Court." See 97 F. 2d 387, 388. As the suit had been instituted within the six year period, the judgment was accordingly reversed and the cause remanded with directions to the District Court "to consider and determine the merits of the controversy."

At the ensuing trial the only defense interposed was that the plaintiff's right to refund for the amount of the overassessment in suit was barred by Sec. 284 (b) and (g) of the Revenue Act of 1926. The claim for refund had been the occasion of the Commissioner's determination of the overassessment for which the plaintiff seeks recovery. The trial court, being of the opinion that the claim had been filed timely, entered judgment for the plaintiff (the amount of the unrefunded overassessment not being in dispute). Thereupon, the defendant took the present appeal.

Although the matter now here for review is the action of the court below in confirming the timeliness of the taxpayer's claim

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[1] Section 3226 of the Revised Statutes, as amended, which was reenacted without change by Sec. 1113 (a) of the Revenue Act of 1926, 26 U. S. C. A. Int. Rev. Acts, p. 324, provides, inter alia, that,—

> "Sec. 3226. * * *. No suit or proceeding [i. e., for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected] shall be begun * * * after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

[2] Section 24 of the Judicial Code (28 U. S. C. A. § 41) provides, in material part, by paragraph (20) that the original jurisdiction of the District Courts shall extend, concurrent with the Court of Claims, to "any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *."

for refund, the appellant asks us to reconsider and reverse the former decision of this court with respect to the period of limitations applicable to the institution of the suit and the question of the District Court's jurisdiction. This, we may not jus-
79 tifiably do, even though we should now be inclined to
disagree with the former decision. (No implication of any such disagreement on our part is intended.) The court below faithfully followed this court's mandate, as it was bound to do. Thereby it was precluded from reconsidering the matters which the appellant seeks to reopen here. Cf. In re Sanford Fork and Tool Co., 160 U. S. 247, 255, 256. See also Federal Communications Commission v. Pottsville Broadcasting Co., U. S. . The former decision of this court became the law of the case and, once the law of a case is settled by an appellate court, it is settled for that tribunal as well as for the trial court, save for new or different facts. Toucey v. New York Life Insurance Co., 112 F. 2d 927, 928 (C. C. A. 8). To reverse the court below in a wholly unchanged factual situation, for doing what this court directed should be done would, to say the least, be a positive disservice to the orderly administration of justice. A second appeal may not be used to raise questions in the same case already put at rest by the same court upon a prior appeal. Toucey v. New York Life Insurance Co., supra.

Coming then, to the one question properly within the scope of the present appeal, we think that the court below correctly held that the claim for refund was filed in time and that the plaintiff is entitled to recover the overpayment of taxes in the amount determined by the Commissioner which still remains unrefunded.

The plaintiff, a Pennsylvania corporation, filed its income tax return on March 15, 1921 for the calendar year 1920 and paid the taxes due, as shown thereon, in equal quarterly installments during the year 1921. The Collectors to whom this tax was paid were not in office at the time the suit herein was filed. Prior to June 15, 1926, the plaintiff filed an income and profits tax waiver extending the statutory period of limitations for the assessment of taxes for the year 1920 to December 31, 1926. On April 10, 1926, the Commissioner of Internal Revenue advised the plaintiff of a deficiency in tax for the year in question in the sum of $1,362.50, which was thereafter
80 duly assessed and, still later, paid by the plaintiff on July
28, 1926. On March 25, 1929 (which was within four years after payment of the final portion of its 1920 taxes) the plaintiff filed a claim for refund of part of the taxes paid for

the year 1920, $13,471.18 of the amount claimed having been paid in 1921 and $1,362.50 on July 28, 1926, as above stated. On September 9, 1929, the Commissioner signed a Schedule of Overassessments which showed a "net amount refundable" to the plaintiff in the sum of $1,362.50 with interest. A check for this amount was later mailed to the plaintiff along with a certificate of overassessment showing that the total overassessment was $14,833.68 but that $13,471.18 thereof was barred by the statute of limitations. The difference represented the amount of the refund then made. The plaintiff received the check and certificate of overassessment in October 1929. On March 7, 1932, the plaintiff filed its statement of claim in the suit below to recover the unrefunded balance of the overassessment as shown by the certificate. Whether the plaintiff is entitled to recover depends upon whether or not the Commissioner was correct in his conclusion that $13,471.18 of the plaintiff's claim for refund was barred by the statute of limitations under the pertinent Revenue Act (1926).

The portions of the Revenue Act (1926, c. 27, 44 Stat. 9, 26 U. S. C. A. Int. Rev. Acts, pp. 220, 222) which are material to the present question are as follows:

"Sec. 284. * * *

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

81 "(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

"(g) * * * If the taxpayer has, on or before June 15, 1926, filed such a waiver [an income and profits tax waiver extending the statutory period of limitations for assessment of taxes] in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *".

As the plaintiff's claim for refund was actually filed on March 25, 1929, it was obviously not filed within the period which expired on April 1, 1927. However, it was filed within four years of the plaintiff's payment on July 28, 1926 of the final portion of the tax due for the year 1920. But, the appellant contends that a claim for refund within the alternate period of four years, prescribed by subsection (g), is limited by subsection (b) (2) to such taxes as were paid within that period. Apparently, the Commissioner of Internal Revenue acted upon a like construction of the statute when he certified for refund merely the portion of the tax paid by the plaintiff within the four year period instead of the whole of the determined overassessment of the taxes paid for the taxable year. No reasonable basis for the distinction is apparent. The appellant admits that, had the claim for refund been filed prior to April 1, 1927, a claim for the refund of the whole of the tax paid for the particular tax year could have been made. Why, then, may the overassessment not be reclaimed, without regard for the amount of the portion of the tax paid within the four year
82 period, when the claim is filed within four years of the payment of the final portion of the tax for the particular year?

Subsection (g) specifically provides that, where a taxpayer has duly filed the required waiver with respect to the time for the assessment of a tax, a "refund relating to *the taxes for the taxable year 1920* * * * shall be * * * made if claim therefor is filed * * * within four years from the time *the tax* was paid. * * *." [Italics supplied.] By "the tax", the entire tax for a particular year is meant and not merely some portion of it. The entire tax for the year is not paid until the last installment or deficiency assessment has been paid. Hills v. United States, 50 F. 2d 302, 305–307 (Ct. Cl.), confirmed on rehearing, 55 F. 2d 1001; United States v. Clarke, 69 F. 2d 748, 750 (C. C. A. 3); Union Trust Co. of Rochester v. United States, 70 F. 2d 629, 630 (C. C. A. 2). The fact that the cases last cited involved claims for the refund of estate taxes does not impair the applicability of the principle that the period of limitations with respect to suit for the recovery or claim for the refund of overassessed taxes dates from the time the last installment of such tax was paid unless the recovery or refund is expressly limited by statute to the portion of the tax paid within the limitation period. The reasoning in the Hills case at pp. 305 and 306 is equally in point here.

The government's contention that subsection (g) is limited by subsection (b) (2) to a refund only of the portion of the overassessed taxes paid within the limitation period disregards the plain direction of subsection (b) that its provisions are applicable except as provided in subsection (g), inter alia. Subsection (g) applies peculiarly to claims for credit or refund growing out of assessments of war income or excess profits taxes under the Revenue Acts from 1917 to 1921, inclusive, with respect to which a waiver of the time for assessment has been filed. The scope and intendment of subsection (g) are separate and distinct from claims for credit or refund such as are dealt with in subsection (b). No plausible reason is advanced why a claim
83 for refund for 1920 taxes under subsection (g) may be larger if filed on or before April 1, 1927, than if filed after that date but within the equally permissible period of four years from the time the tax was paid. To reach such a conclusion would require that one of two coordinate clauses be treated as superior to the other. The suggestion derives entirely from the appellant's use in argument of a wholly unrelated provision of the statute.

We conclude that the plaintiff's claim for refund was timely, having been filed within four years of the final payment on account of the tax liability for the year in question. Consequently, the Commissioner was in error in refusing to certify for refund the total determined overassessment. His action, based as it was on an invalid reason, did not amount to a disallowance of the claim. The two year limitation which runs from the time of the disallowance of the claim is therefore not pertinent. The plaintiff's right of action arose from the certificate of overassessment and the suit, which was instituted within six years from the date of payment of the tax, was timely. Bonwit Teller & Co. v. United States, 283 U. S. 258, 263–265. The suit was for the recovery of a tax erroneously assessed and collected, as the Commissioner had formally determined. The Collectors to whom the tax had been paid were no longer in office. The District Court therefore had jurisdiction. United States v. Bertelsen & Petersen Engineering Co., 306 U. S. 276, 281.

The judgment of the District Court is affrmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

84 In United States Circuit Court of Appeals for the Third Circuit

No. 7375. October Term, 1940

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-PLAINTIFF

Judgment

Filed December 17, 1940

On appeal from the District Court of the United States, for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Philadelphia, December 17, 1940.

JONES,
Circuit Judge.

[File endorsement omitted.]

85 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

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Supreme Court of the United States

Order allowing certiorari

Filed April 14, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1941

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INDEX

CITATIONS

299868—41——1

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on December 17, 1940.

OPINIONS BELOW

The first opinion of the District Court (R. 25–26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27–33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34–37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41–46) is not yet reported.

JURISDICTION

The judgment of the court below was entered on December 17, 1940. (R. 47.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

During the year 1921 the taxpayer paid its income taxes for the year 1920. In 1926, it made a small additional payment in respect of its 1920 taxes. In 1929, it filed a claim for refund of all of its 1920 taxes. The questions presented are:

1. Whether, under Section 284 (b) (2) and (g) of the Revenue Act of 1926, the claim for refund which would otherwise be untimely as to the payments made in 1921 is timely with respect thereto merely because of its timeliness with respect to the 1926 payment.

2. Whether, in any event, even if the claim were timely, this suit, instituted in 1932, has been brought too late. The answer to this question depends in part upon whether the general six-year period of limitations in the Tucker Act must be read as superseding the comprehensive scheme of limitations with respect to taxes set forth in Revised Statutes, Section 3226.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 15–19.

STATEMENT

The taxpayer began this suit in the District Court on March 7, 1932 to recover income taxes for the year 1920. (R. 3.) A judgment in favor of the Government on the ground that the suit was barred by the statute of limitations (R. 25–26) was reversed by a majority of the court below, Judge Biggs dissenting, and the case was remanded to the District Court (R. 27–33). The Government renewed its contention that the suit had been barred, and argued further, *inter alia*, that the claim for refund upon which the suit was predicated was not timely. The District Court entered judgment for the taxpayer (R. 34–38), which was thereupon affirmed by the court below (R. 41–47). The facts may be summarized as follows:

The taxpayer, a Pennsylvania corporation, filed its 1920 income tax return on March 15, 1921, disclosing a total tax liability in the amount of $52,481.97, which it paid in four installments in 1921. (R. 3–4.)

On April 10, 1926 the Commissioner of Internal Revenue advised the taxpayer of a $1,362.50 deficiency for the year 1920. The taxpayer had executed a waiver extending the period of limitations for assessment of its 1920 taxes to December 31, 1926. (R. 4.)

The taxpayer paid the deficiency on July 28, 1926, and on or about March 23, 1929 filed a claim

for refund of *all* of the taxes for the year 1920. (R. 4.)

On September 9, 1929, the Commissioner signed a schedule of overassessment, and in October, 1929 mailed to the taxpayer a certificate of overassessment showing $1,362.50 as the net amount refundable with interest and enclosing a check therefor. (R. 4, 11, 19–24, 26.)

The certificate of overassessment disclosed the following (R. 19):

Tax assessed:	
Original, Account No. 422,472	$52, 481. 97
Additional July 1926, Page 1, Line 5	1, 362. 50
Total Assessment	$53, 844. 47
Correct tax liability	39, 010. 79
Overassessment	$14, 833. 68
Barred by Statute of Limitations	13, 471. 18
Overassessment allowable	$1, 362. 50

* * * * *

The Commissioner therefore refunded to the taxpayer the additional tax paid within four years from the date of filing the claim for refund but denied a refund of the original 1920 tax paid in 1921 as not refundable by reason of the limitation of Section 284 of the Revenue Act of 1926. (R. 19.)

Upon the taxpayer's filing of this suit for refund in 1932, the Government contended and the District Court held that this suit is not maintainable since, under Revised Statutes, Section 3226, it was brought more than two years after the dis-

allowance of the claim for refund, and more than five years after any payment of taxes for the year in question. The Circuit Court of Appeals reversed, holding that the general six year period of limitations in the Tucker Act was applicable, and that the small additional payment in 1926, even though actually refunded, kept alive for six years thereafter the right to sue for refund of an overpayment made some years before in 1921.

Upon remand to the District Court, the Government not only attacked the decision of the court below, but contended further that in any event the claim for refund filed in 1929 could not, under Section 284 (b) (2) and (g) of the Revenue Act of 1926, support a suit for refund of the taxes paid in 1921. The judgment of the District Court against the Government was affirmed by the court below.

In this Court, the Government now seeks review of the results reached by the court below on both appeals.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the provisions of Section 284 (g) of the Revenue Act of 1926, a refund claim filed within four years of a 1926 payment is a sufficient basis for a suit to recover the original tax paid in 1921.

2. In holding that the Tucker Act (Section 24 (20) of the Judicial Code, as amended) amended

Section 3226 of the Revised Statutes and authorized a suit in 1932 to recover taxes paid in 1921.

3. In holding that there was no rejection of the claim for refund and that therefore the two year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

4. In holding that the five year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

5. In holding that the District Court had jurisdiction to entertain this suit.

6. In affirming the decision of the District Court entering judgment for the taxpayer.

REASONS FOR GRANTING THE WRIT

Two important questions are here presented, on one of which there is a direct conflict.

The tax year here involved is the calendar year 1920, and the taxes in the amount of $13,471.18 which respondent seeks to recover were paid in 1921. The claim for refund upon which this suit is founded was filed in March 1929, and was disallowed during the same year. The claim was allowed to the extent of $1,362.50 which respondent had paid during the year 1926 as a deficiency; and the disallowance of the larger amount sought in this proceeding was on the ground that the statute of limitations had run. This suit for refund was brought March 7, 1932, more than two years after such disallowance.

In opposing the maintenance of this suit, two major issues are raised: first, that when respondent filed its claim for refund in 1929, the time within which it could have filed a claim for refund of taxes paid in 1921 had already elapsed; and, second, even if the 1929 claim were timely, this suit, instituted in 1932, was brought too late.

1. *The 1929 claim for refund was untimely.* The applicable statutory provisions are contained in the Revenue Act of 1926, which undertook not only to specify the limitations periods for taxes imposed by that Act, but also codified the limitations periods for taxes imposed by prior revenue acts.

Section 284 (b) (1) of the 1926 Act provides that "No * * * refund shall be * * * made * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer." And Section 284 (g) of the 1926 Act extends the period in any event to April 1, 1927 in a case where the taxpayer has filed a waiver on or before June 15, 1926:

> If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed

> either on or before April 1, 1927, or within four years from the time the tax was paid.

Thus, since respondent did file a waiver prior to June 15, 1926 (R. 4, 5), it had at least until April 1, 1927 within which to file a claim for refund of its 1920 taxes. But since it had paid those taxes in 1921, it would seem equally plain that it could not file a claim for refund after April 1, 1927.

Respondent's sole attempt to escape the consequences of these provisions lies in the fact that it paid $1,362.50 in 1926 as a deficiency upon its 1920 income, and it contends that such additional payment started anew the running of the four year period within which it could file a claim for refund. The Commissioner recognized the respondent's right to seek refund in 1929 to the extent of the payment made in 1926, but ruled that such payment could not extend the time within which respondent could seek refund of the taxes actually paid in 1921.

It seems quite plain that Congress could not have intended to permit a taxpayer to extend the period of limitations by making a relatively small additional payment at a time when the period is about to expire. And whatever doubt there may have been on this question is dispelled by Section 284 (b) (2) of the 1926 Act which unambiguously provides:

> The amount of the * * * refund shall not exceed the portion of the tax paid

> during the * * * four years * * * immediately preceding the filing of the claim * * *.

The court below refused to apply these provisions, stating that although they were a limitation upon Section 284 (b) (1), they did not affect Section 284 (g). In so holding, the decision below is in direct conflict with *Weinburg* v. *United States*, 25 F. Supp. 83 (C. Cls.), certiorari denied, 306 U. S. 661,[1] where the opposite result was reached in construing the identical statutory provisions. See also *Straus* v. *United States*, 25 F. Supp. 88 (C. Cls.), certiorari denied, 306 U. S. 661.

2. *In any event, even if the 1929 claim were timely as to the taxes paid in 1921, this suit was brought too late.* The claim for refund was disallowed in 1929, and this suit was instituted March 7, 1932. But Revised Statutes, Section 3226, as reenacted by Section 1113 (a) of the Revenue Act

[1] The court below did not attempt to distinguish the *Weinburg* case, nor did it even mention that case, notwithstanding that the Government placed its primary reliance upon the *Weinburg* decision on this branch of the case. However, the *Weinburg* decision is referred to in the second opinion of the District Court (R. 36), and was rejected upon the ground that the Court of Claims had invoked the legislative history of a different statute in construing the applicable provisions. Thus, not only does the District Court's decision run squarely contrary to the *Weinburg* decision, but the reason it gave for refusing to follow that decision is specious, for the legislative history related to the substantially identical provisions in a prior revenue act that were simply reenacted in the Revenue Act of 1926, the statute here involved.

of 1926, Appendix, *infra*, p. 17, provides that in the case of any internal revenue tax alleged to have been illegally collected no suit or proceeding for refund shall be begun "* * * after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

This suit, however, was not brought either within five years of payment or within two years of disallowance.[2] For, even if the payment of the deficiency in 1926 which was later refunded be regarded as "the payment of such tax" under Section 3226, this suit was brought more than five years after such payment, and it was brought more than two years after the 1929 disallowance of the claim.

The court below was able to circumvent the effect of these provisions only by relying upon the general six-year period of limitations contained in the Tucker Act (Section 24 (20) of the Judicial Code), and held that, since this suit was brought within six years of the 1926 payment,

[2] It seems quite plain that the Commissioner's refusal to refund any amount in excess of the 1926 payment constituted a disallowance as to the remainder, and the court below so treated it on the first appeal. (R. 29.) Although the court on the second appeal refused to consider the question of the timeliness of the suit (R. 43), it did seem to say, erroneously, we believe, that the claim for refund was not disallowed by the Commissioner (R. 46).

the taxpayer could now recover taxes paid in 1921.[3]

The Tucker Act is the general statute which authorizes suits against the United States both in the Court of Claims and in the district courts. In general language, it states that "No suit * * * shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made." In 1921, it was amended by Section 1310 (c) of the Revenue Act of 1921 to extend the jurisdiction of the district courts to tax claims above $10,000 where the collector who collected the tax was dead at the time the suit

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[3] That result was reached by a majority of the court below (Judges Thompson and Buffington) over the dissent of Judge Biggs, when this case was before the court on the first appeal. (R. 27–33.) In view of the fact that the case was remanded to the District Court for further proceedings, the Government regarded the judgment of the Circuit Court of Appeals as interlocutory in character, and for that reason refrained from petitioning for certiorari at that time. It is clear that the question is now open. Cf. *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258; *Smith* v. *McCullough*, 270 U. S. 456, 461. See discussion by Judge Magruder in *White* v. *Higgins*, 116 F. (2d) 312, 317 (C. C. A. 1st).

Judge Biggs' dissent was upon the ground that the taxpayer's cause of action really rested upon an account stated, and that it had not only failed to make out a case thereon, but also that it should have brought suit in the Court of Claims rather than in the District Court. If certiorari is granted, we intend to urge those considerations as additional alternative reasons for reversing the judgment below.

was brought. But there was not the slightest indication that Congress intended the comprehensive limitations provisions relating to taxes set forth in Revised Statutes, Section 3226, to be superseded by the general six-year provision in the Tucker Act.[4] Indeed, Section 3226 was itself likewise amended in certain particulars by the Revenue Act of 1921 (Section 1318); and had Congress understood the Tucker Act as limiting the provisions of Section 3226, it plainly would have so indicated at that time. But more than that, Section 3226 was further reenacted by the Revenue Act of 1926, and Congress again set forth the comprehensive limitations provisions relating to taxes, without any recognition of the possibility that those provisions had been superseded some years prior thereto by the Tucker Act in respect of suits against the United States for refund of taxes. And Section 3226 has been judicially regarded as specifying the limitations period for suits for refund of taxes. *Stearns Co.*

[4] Even under the theory that the Tucker Act applies, the decision below is wrong, because the suit filed in 1932 was begun more than six years "after the right accrued." The 1926 overpayment has already been refunded to the taxpayer, and it seeks refund now only with respect to an alleged overpayment made in 1921. Accordingly, the right in respect of which the taxpayer seeks refund "accrued" in 1921, and this suit was instituted about eleven years thereafter. Of course, if the taxpayer's action is grounded upon an "account stated" the right probably "accrued" on the date of the issuance of the certificate of overassessment; but in that event, this proceeding would be fatally defective for the reasons stated by Judge Biggs (R. 30).

v. *United States,* 291 U. S. 54, 65; *United States* v. *Michel,* 282 U. S. 656; *Savannah Bank & Trust Co.* v. *United States,* 58 F. (2d) 1068 (C. Cls.).[5]

Moreover, since Section 3226 applies to all suits for refund of taxes, to suits against collectors as well as suits against the United States, a most anomalous result would follow from the decision below. Under the court's decision, a six-year period would be applicable to suits against the United States, whereas the five-year period would continue to apply to suits against collectors. These absurd consequences emphasize the seriousness of the error committed by the court.

We respectfully submit that in holding that the comprehensive statutory provisions governing the limitations periods for suits to recover federal taxes have been impliedly superseded by the general six-year period in the Tucker Act, the court below has decided a question of great importance in the administration of the tax laws which should be re-

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[5] In taking a contrary view the court below relied upon *Bates Mfg. Co.* v. *United States*, 303 U. S. 567. But that case did not raise the question whether the Tucker Act had amended Section 3226. It involved merely the question of when a suit was begun, and this Court held that the date of the filing of the petition controlled rather than the date of service of the petition. The Tucker Act, of course, furnishes the statutory basis for suits against the United States, and the Court in the *Bates* case correctly considered the issue as one of determining whether the conditions specified in the Tucker Act had been complied with. Here, however, Section 3226 superimposes additional requirements with respect to federal taxes, and the only question is whether those additional requirements shall be given effect.

viewed by this Court. Indeed, this question is perhaps even more important than the first question presented, and if certiorari is granted with respect to the first question the writ should include the second as well.

CONCLUSION

Because of the conflict with the *Weinburg* case on the construction of Section 284 of the Revenue Act of 1926, and the importance, in all federal tax litigation, of whether the Tucker Act extends beyond the provisions of Revised Statutes, Section 3226, the period for bringing suit, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period

thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

* * * * *

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revene tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding

may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." [U. S. C., Title 26, Sec. 1672.]

* * * * *

Judicial Code:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and

of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * *. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * [U. S. C., Title 28, Sec. 41.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

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INDEX

CITATIONS

313995—41——1

Cases—Continued.

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 853

UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the District Court (R. 25–26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27–33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34–37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41–46) is reported in 117 F. (2d) 133.

JURISDICTION

The judgment of the court below was entered on December 17, 1940 (R. 47). The petition for a

writ of certiorari was filed March 15, 1941, and was granted April 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

During the year 1921 the taxpayer paid its income taxes for the year 1920. In 1926, it paid an additional assessment in respect of its 1920 taxes. In 1929, it filed a claim for refund of all of its 1920 taxes. The claim was disallowed in September 1929, and this suit was instituted in March 1932. The questions presented are—

1. Whether the maintenance of this suit is barred by Section 3226 of the Revised Statutes since it was brought more than five years after payment and more than two years after disallowance of the claim for refund.

2. Whether, even if the suit itself were timely, it is otherwise defective because based upon a claim for refund that is untimely under Section 284 (b) (2) and (g) of the Revenue Act of 1926.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 42–47.

STATEMENT

On March 7, 1932, the taxpayer began this suit in the District Court to recover income taxes in the amount of $13,471.18 for the year 1920 (R. 3). On August 26, 1936, the District Court filed an

opinion and order granting the Government's motion for judgment on the ground that the suit was barred by Section 3226 of the Revised Statutes (R. 25–26). The Circuit Court of Appeals, with Judge Biggs dissenting, reversed the judgment and remanded the case to the District Court (R. 27–33).

The Government renewed its contention in the District Court that the suit was barred and argued further that the claim for refund upon which the suit was predicated was not timely, under Section 284 (b) and (g) of the Revenue Act of 1926. The District Court entered judgment for the taxpayer (R. 34–38) and its decision was subsequently affirmed by the court below (R. 41–47). The material facts may be summarized as follows:

The taxpayer, a Pennsylvania corporation, filed its income tax return on March 15, 1921 (R. 3, 34). The return disclosed a total tax liability in the amount of $52,481.97, which was paid in four quarterly installments during the year 1921 (R. 3–4, 34). The first two installments were paid to Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, and the last two installments were paid to Lederer's successor, Blakely D. McCaughn (R. 3, 4, 8). The present suit was instituted after both of these Collectors had ceased to hold office (R. 3–4, 34).

Prior to June 15, 1926, the taxpayer had filed with the Commissioner a waiver of its right to have the taxes due for the year 1920 determined and assessed within five years after the return was filed.

This waiver was conditioned to expire on December 31, 1926, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1924. The Commissioner accepted and executed the waiver (R. 9, 34).

On April 10, 1926, the Commissioner of Internal Revenue advised the plaintiff by registered mail of a deficiency for 1920 in the amount of $1,362.50; no appeal was taken to the Board of Tax Appeals and the deficiency was assessed July 10, 1926, and paid July 26, 1926 (R. 4, 9, 34).

On March 23, 1929, the taxpayer filed a claim for refund of $53,844.47, the total taxes paid for the year 1920 (R. 10, 34).

The Commissioner considered this claim, determined that there had been an overassessment of $14,833.68, of which $1,362.50 was refundable, the refund of the balance being barred. A certificate of overassessment was thereafter mailed to the taxpayer with a check for $1,362.50, plus interest, and was received by it in October 1929 (R. 4, 6, 10, 19–24, 26).

The certificate of overassessment disclosed the following (R. 19):

Tax assessed:	
Original, Account #422,472	$52, 481. 97
Additional July 1926, Page 1, Line 5 #2	1, 362. 50
Total assessment	53, 844. 47
Correct tax liability	39, 010. 79
Overassessment	14, 833. 68
Barred by Statute of Limitations	13, 471. 18
Overassessment allowable	1, 362. 50

The Commissioner thus refunded to the taxpayer an amount equal to the portion of the tax paid within four years from the date of the filing of the claim for refund (the amount of the additional assessment, $1,362.50) but denied a refund of $13,-471.18 (a portion of the original tax) on the ground that recovery of that amount was not allowable under Section 284 of the Revenue Act of 1926 (R. 19–20).

Upon the taxpayer's filing of this suit the Government contended and the District Court held that the suit is not maintainable since under Section 3226 of the Revised Statutes it was brought more than two years after the disallowance of the claim for refund and more than five years after any payment of taxes for the years in question. The Circuit Court of Appeals reversed. It noted that suit had been instituted within six years of the 1926 payment, and ruled not only that the general six-year period of limitations in the Tucker Act must be treated as expanding the five-year period in Section 3226 of the Revised Statutes, but also that the small 1926 payment started the running of a fresh six-year period with respect to the 1921 payments.

Upon remand to the District Court the Government, as stated, again urged that the suit was brought too late, and contended further that in any event the claim for refund filed in 1929 could not, under Section 284 (b) (2) and (g) of the Revenue Act of 1926, support the recovery of the

taxes paid in 1921. The judgment of the District Court against the Government was affirmed by the court below (R. 47).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the provisions of Section 284 (g) of the Revenue Act of 1926, a refund claim filed within four years of a 1926 payment is a sufficient basis for a suit to recover the original tax paid in 1921.

2. In holding that the Tucker Act (Section 24 (20) of the Judicial Code, as amended) amended Section 3226 of the Revised Statutes and authorized a suit in 1932 to recover taxes paid in 1921.

3. In holding that there was no rejection of the claim for refund and that therefore the two-year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

4. In holding that the five-year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

5. In holding that the District Court had jurisdiction to entertain this suit.

6. In affirming the decision of the District Court entering judgment for the taxpayer.

SUMMARY OF ARGUMENT

This is a suit to recover income taxes for the year 1920. The taxpayer paid $52,481.97 in 1921 and $1,362.50 in 1926 on its 1920 tax liability. In March

1929 it filed a claim for refund of all of its 1920 taxes. The Commissioner determined that there had been an overassessment in the amount of $14,833.68, but he refunded only $1,362.50, treating the remaining $13,471.18 as barred by limitations. This suit was brought to recover the $13,471.18 and was instituted on March 7, 1932. There are two fatal objections to the maintenance of this suit:

(1) Section 3226 of the Revised Statutes forbids the bringing of a suit for refund of federal taxes "after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates." Respondent, however, seeks to recover taxes paid in 1921; but even if the 1921 payments be treated as having been made in 1926, when respondent made the final payment of $1,362.50, this suit is nevertheless barred. It was brought in 1932, more than five years after the 1926 payment, and more than two years after the 1929 disallowance of the claim for refund upon which the suit rests.

The court below was able to circumvent the conclusive effect of Section 3226 only by the strained conclusion that the general six-year period of limitations in the Tucker Act must be taken to have amended Section 3226 by implication. That decision is wholly untenable.

The Tucker Act and Sectior 3226 of the Revised Statutes have existed side by side for over fifty years. And beginning with 1921 each has been amended or reenacted at least four times, sometimes by the same statute. Yet at each such instance, Congress did not give the slightest indication that it regarded the general six-year period in the Tucker Act as superseding the comprehensive and detailed provisions of law governing the refund of federal taxes. Moreover, this Court and the lower Federal courts have repeatedly treated the provisions of Section 3226 as applicable, rather than the general six-year period in the Tucker Act. That six-year period merely marks the outside limit, and was never intended to expand by implication the specific provisions of law relating to taxes.

The only decisions which suggest the applicability of the six-year period in the Tucker Act involve suits against the United States on an "account stated." The theory of those cases is that as a result of certain transactions between the taxpayer and the Government there has arisen an "account stated" and suit is brought against the United States, not to recover federal taxes, but rather upon its contractual liability growing out of the account stated. However, for reasons set out at length in the Argument, *infra,* it is clear that this suit cannot be maintained as a suit on an account stated.

(2) But even if the suit itself had been brought within two years after the 1929 disallowance of the

claim for refund and were thus not barred by Revised Stautes, Section 3226, then nevertheless it would be defective because the claim for refund itself was untimely under Section 284 (b) and (g) of the Revenue Act of 1926.

Section 284 (b) contains the general provisions fixing the time within which the claim must be filed and also the amount refundable under the claim. It states in (b) (1) that except as otherwise provided in subsequent subsections "No * * * refund shall be * * * made after four years from the time the tax was paid * * *" unless a claim therefor has been filed before the expiration of that period. And (b) (2) declares that the amount recoverable "shall not exceed the portion of the tax paid during the * * * four years * * * immediately preceding the filing of the claim * * *." Subsection (g) merely provides in substance, to the extent material, that in the case of 1920 taxes where the taxpayer has filed a waiver, the limitations period shall expire either on April 1, 1927, or four years after payment. But respondent's claim in this case was filed in 1929, and was therefore timely only as to the 1926 payment. Had it filed a claim prior to April 1, 1927, it could recover any overpayment for the year 1920, but since the claim was filed in 1929, subsection (b) (2) limits recovery to the amount paid within four years prior thereto. The Treasury has refunded the 1926 payment, and the claim for the remainder, paid in 1921, was therefore untimely.

ARGUMENT

Introductory.—The taxpayer instituted this suit to recover income taxes for the year 1920 in the amount of $13,471.18. It had paid the bulk of its 1920 taxes, in the amount of $52,481.97, during the year 1921. It also made a small additional payment in the amount of $1,362.50 for the year 1920 in 1926. In response to a claim for refund of all of its 1920 taxes, filed on March 23, 1929, the Commissioner refunded $1,362.50, the amount paid in 1926, but refused to refund any of the payments made in 1921. The Commissioner's refusal was evidenced by the schedule of overassessment which he signed on September 9, 1929, and by a letter which he sent to the taxpayer in October 1929 (R. 26).

This suit was brought on March 7, 1932, and is fatally defective for at least two major reasons. First, Revised Statutes, Section 3226 forbids the suit, since it was brought more than two years after the rejection of the claim for refund and more than five years after the payment of the tax sought to be recovered. Second, in any event, even if the suit itself were not contrary to the requirements of Section 3226, it is defective because the 1929 claim for refund upon which it is based was untimely under Section 284 (b) and (g) of the Revenue Act of 1926.

I

THIS SUIT IS BARRED BY REVISED STATUTES, SECTION 3226

1. Section 3226 of the Revised Statutes, as reenacted by Section 1113 (a) of the Revenue Act

of 1926, Appendix, *infra*, p. 45, provides that in the case of any internal-revenue tax alleged to have been illegally collected no suit or proceeding for refund shall be begun [1]

> * * * after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.

The present suit fails to qualify as timely under either of the alternatives permitted by Section 3226. The 1920 taxes which respondent seeks to recover were paid in 1921, and the small additional payment made in 1926 has already been returned to it (R. 10, 34). But even if all the taxes involved be treated as having been paid in 1926, then, nevertheless, this suit, instituted on March 7, 1932, was begun more than five years thereafter.

Accordingly, since this suit was not begun within five years from the last date of payment, it can be timely only if "begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates." But

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[1] These provisions were subsequently amended by Section 1103 (a) of the Revenue Act of 1932, c. 209; 47 Stat. 169, Appendix, *infra*, p. 46; but Section 1103 (b) of that Act specifically provided that the amendment did not affect suits or proceedings instituted before the date of enactment of the Act, June 6, 1932. Accordingly, since the present suit was begun on March 7, 1932, its timeliness must be measured by the provisions of Section 3226 as they stood prior to amendment by the 1932 Act.

respondent's claim for refund was acted upon by the Commissioner on September 9, 1929. On that date the Commissioner signed a schedule of overassessment in which he allowed the claim to the extent of $1,362.50, i. e., the amount which had been paid in 1926, but refused to allow the remaining overpayment of $13,471.18, which he treated as then barred. The Commissioner notified the taxpayer of his action on October 20, 1929 (R. 26). Thus, this suit was begun more than two years after the Commissioner's refusal to make the refund which the taxpayer now seeks.

It is therefore abundantly clear that this suit cannot be maintained under Section 3226. It was not begun either within five years of payment or within two years of rejection of the claim, and is therefore fatally defective. Cf. *United States* v. *Michel,* 282 U. S. 656.

2. In view of the conclusive effect of Section 3226, the District Court entered judgment in favor of the Government (R. 25–26). The Circuit Court of Appeals likewise apparently recognized the result that would be reached by applying Section 3226, for, after referring to those provisions, it stated (R. 29):

> It is obvious from an examination of the relevant dates that whether we consider November 1921, when the original tax was paid, or July 1926, when the deficiency was assessed and paid, as the date of the last payment, more than five years from the last

payment elapsed prior to suit. It is equally obvious that more than two years elapsed from the date of disallowance of the claim for refund.

But a majority of that court, composed of Judges Thompson and Buffington, refused to apply Section 3226 upon the astounding theory that these specific, comprehensive limitations provisions relating to federal taxes had been superseded by the general six year period of limitations in the Tucker Act (R. 29). That decision was so revolutionary and so patently incorrect that the Government considered applying for certiorari immediately, but refrained from doing so because the case had been remanded for further proceedings which it thought might result in a favorable decision to the Government, thereby avoiding the necessity of burdening this Court with the request for review. However, the Government kept the issue alive upon remand to the District Court and argued the question upon the second appeal in the Circuit Court of Appeals. The Circuit Court of Appeals refused to reconsider the question, stating that the former ruling had become the law of the case (R. 43). But, regardless of whether it had become the law of the case for the court below, it is plain that since this Court has not ruled upon the issue, it is not the law of the case here and is open for consideration. See *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258; *Smith* v. *McCullough*, 270 U. S. 456, 461; *Panama*

Railroad v. *Napier Shipping Co.,* 166 U. S. 280, 284; *Davis* v. *O'Hara,* 266 U. S. 314, 321. Indeed, in *Burnet* v. *J. Rogers Flannery & Co.,* 286 U. S. 524, this Court reversed a judgment of the Circuit Court of Appeals on a point which the court below had decided on a prior appeal and on which this Court had refused to grant certiorari at the time of the prior appeal. See also *White* v. *Higgins,* 116 F. (2d) 312, 317 (C. C. A. 1st).[2]

3. The holding that the limitations provisions of Section 3226 had been superseded by the general six-year period in the Tucker Act is plainly erroneous. The Tucker Act and Section 3226 of the Revised Statutes had existed side by side for many years, and there never has been at any point any Congressional intention to sweep away the specific detailed limitations provisions in the Revised Statutes applicable to federal taxes, substituting therefor the general six-year period in the Tucker Act. A brief history of each of the statutes will be helpful in demonstrating the error of the court below.

[2] Moreover, the court below itself had power to reconsider the question upon the second appeal. The same court in *Kelly-Springfield Tire Co.* v. *United States,* 110 F. (2d) 823, 827 (C. C. A. 3d), had no hesitancy in expressly overruling its prior decision. The principle of the law of the case does not limit the power of the court and is disregarded where injustice would otherwise result. *Messenger* v. *Anderson,* 225 U. S. 436; *Johnson* v. *Cadillac Motor Car Co.,* 261 Fed. 878, 883–886 (C. C. A. 2d); *Cochran* v. *M & M Transp. Co.,* 110 F. (2d) 519 (C. C. A. 1st); *White* v. *Higgins,* 116 F. (2d) 312, 317 (C. C. A. 1st); *Connett* v. *City of Jerseyville,* 110 F. (2d) 1015 (C. C. A. 7th).

As originally enacted many years ago in the Revised Statutes, Section 3226, together with companion provisions in Section 3227, set forth conditions and limitations upon suits for refund of federal taxes. Subsequently, the Revenue Act of 1921 repealed Section 3227 [3] and amended Section 3226, bringing together and extensively revising the provisions formerly in both Sections. The five-year period appeared for the first time in these new provisions. Thereafter, these provisions were amended in a minor detail by Section 1014 of the Revenue Act of 1924, and, as thus amended, were then reenacted without change by Section 1113 (a) of the Revenue Act of 1926, Appendix, *infra*, p. 45. As thus reenacted in the 1926 Act, Section 3226 of the Revised Statutes contains the operative provisions which are applicable here.

The Tucker Act provisions similarly have a history spreading over many years. As enacted in 1887, c. 359, 24 Stat. 505, they gave to the lower federal courts jurisdiction over suits against the United States concurrent with the Court of Claims, imposing, however, a jurisdictional limit of $1,000 in the district courts and $10,000 in the circuit courts. And in general language Section 1 provided:

> That no suit against the Government of the United States, shall be allowed under this

[3] See Section 1319 of the Revenue Act of 1921, c. 136, 42 Stat. 227. The amendment to Section 3226 of the Revenue Statutes was accomplished by Section 1318 of the 1921 Act.

> act unless the same shall have been brought within six years after the right accrued for which the claim is made.

The Act dealt generally with all claims against the United States, and the limitations period just referred to obviously fixed an outside limit of six years within which suit might be brought. Thereafter, in 1911, these Tucker Act provisions were reenacted in Section 24 (20) of the Judicial Code, c. 231, 36 Stat. 1091. Under the Code, they gave to the district courts concurrent jurisdiction with the Court of Claims in all cases of claims not exceeding $10,000, and retained in substantially identical language the general six-year period of limitations. As thus reenacted by Section 24 (20) of the Judicial Code, these Tucker Act provisions still dealt generally with suits on all claims against the United States and included without specific mention claims for overpayment of federal taxes. Still later, Section 1310 (c) of the Revenue Act of 1921 amended these provisions further, giving the district courts jurisdiction in the case of federal taxes even where the claim exceeds $10,000, if the collector of internal revenue who had collected the tax was dead at the commencement of the suit. The amendment was thereafter reenacted without change in Section 1025 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253; it was further amended by the Act of February 24, 1925, c. 309, 43 Stat. 972, to provide for suits on tax claims in excess of $10,000 where

the collector was either dead or out of office. It was then finally reenacted by Section 1122 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and as thus amended and reenacted, Section 24 (20) of the Judicial Code, Appendix, *infra*, pp. 46–47, furnishes the basis for the decision of the court below. The court ruled that Revised Statutes Section 3226 had been "amended by the Tucker Act" so as to substitute a six-year period of limitations in place of the requirements of Section 3226 (R. 29).

We respectfully submit that nothing in the Tucker Act, either as originally enacted or as subsequently modified and reenacted, in any way affected the specific comprehensive limitations provisions as to federal taxes that are contained in the Revised Statutes. The Tucker Act provisions at no point refer to or undertake to amend Section 3226. If any modification did occur it must have been by implication only. Yet the Revenue Act of 1921 specifically amended not only the Tucker Act provisions, but also Section 3226, establishing the five-year period for the first time. If the court below is correct, then Congress must be charged with the absurdity of specifying a five-year period in Section 3226 and simultaneously repealing it in favor of a six-year provision. But more than that—both Section 3226 of the Revised Statutes and Section 24 (20) of the Judicial Code have each been reenacted or amended at least three times since 1921, and Congress did not indicate on any

such occasion that it regarded the six-year period in Section 24 (20) as expanding the limitations period specified in Section 3226.

It seems plain that the six-year provision was merely an outside limit on all suits against the United States. Suits on tax claims are subject to the more specific and comprehensive limitations set forth in Section 3226 of the Revised Statutes. Cf. *Missouri* v. *Ross,* 299 U. S. 72, 76. Indeed, over 36 years ago, it was judicially recognized that the general limitations provisions in the Tucker Act were not to be construed as expanding the more precise limitations spelled out in the Revised Statutes with respect to federal taxes. *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326 (C. C. A. 8th). And this Court as well as the lower courts have repeatedly treated the provisions of Section 3226 as applicable, rather than the general six-year period in the Tucker Act. *Stearns Co.* v. *United States,* 291 U. S. 54; *United States* v. *Michel,* 282 U. S. 656; *Daube* v. *United States,* 289 U. S. 367; *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276; *Moses* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th); *Savannah Bank & Trust Co.* v. *United States,* 58 F. (2d) 1068 (C. Cls.); *Phoenix State Bank & Trust Co.* v. *Bitgood,* 28 F. Supp. 899, 900 (D. Conn.).

The foregoing principles are not qualified in any way by *Bates Mfg. Co.* v. *United States,* 303 U. S.

567, upon which the court below relied (R. 29) in reaching a contrary result. The *Bates* case involved the question of when the suit was begun, and this Court held, construing the Tucker Act, that the filing of the petition rather than the service of the petition constituted the commencement of the proceeding. The Tucker Act, of course, furnishes the statutory basis for suits against the United States and this Court properly considered whether the conditions specified in the Tucker Act had been complied with. Here, however, there are in addition more exacting requirements which Section 3226 of the Revised Statutes imposes upon suits for refund of taxes, and those conditions must be satisfied before the questions under the Tucker Act are even reached. Would respondent contend, for example, that it could sue for refund under the Tucker Act without first having filed a claim for refund under Section 3226?

Moreover, a most anomalous result would follow if the decision below were correct. Section 3226 purports to apply to all suits for refund of federal taxes, whether they be suits against the United States or suits against the collector. But the Tucker Act has application only to suits against the United States. Accordingly, under the court's decision, a taxpayer would have six years within which to sue the United States under the Tucker Act, but would have only five years within which to sue the collector. But since

it is quite apparent that the cause of action is essentially the same whether suit is brought against the United States or against the collector (cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373), it would be absurd to attribute such a whimsical result to Congress in the absence of any express language so providing.

4. Nor is respondent aided by the decisions holding Section 3226 inapplicable or suggesting the applicability of the six-year period in the Tucker Act, where the taxpayer had brought suit against the United States on an "account stated." See *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265. Cf. *Blue Jay Lumber Co.* v. *United States,* 27 F. Supp. 707, 712 (C. Cls.); *Wood* v. *United States,* 17 F. Supp. 521, 527 (C. Cls.); *Arthur C. Harvey Co.* v. *United States,* 23 F. Supp. 444, 449, (C. Cls.), certiorari denied, 305 U. S. 642, rehearing denied, 307 U. S. 651.

In those cases the Commissioner of Internal Revenue had issued a certificate of overassessment, and suit was brought, not to recover taxes as such, but rather upon the certificate of overassessment itself on the ground that it constituted an "account stated." The theory of the action was that the certificate of overassessment embodied an implied promise to pay and that the right sued upon was contractual. Cf. *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276. That right came into being for the first time upon the rendition

of the so-called account stated, thereby starting the running of a fresh period of limitations; and since it was contractual in nature it was not subject to the limitations periods dealing with suits for refund of taxes but was merely subject to the general six-year period of the Tucker Act which governs all suits on contractual claims against the United States—so the theory ran. But where there is some impediment which prevents treating the certificate of overassessment as an account stated, then the taxpayer can recover only if there is full compliance with Section 3226, Revised Statutes, and any other provisions regulating the maintenance of suits for refund of federal taxes. See *Daube* v. *United States*, 289 U. S. 367, where the Court said (p. 370):

> By § 3226 of the Revised Statutes as amended by the Revenue Act of 1921, no suit may be maintained for the recovery of any internal revenue tax erroneously or illegally assessed or collected unless begun within five years from the date of payment. Revenue Act of 1921, c. 136, 42 Stat. 268, § 1318, amending R. S. § 3226; 26 U. S. Code, § 156. This suit was not brought within the time so limited. It is therefore too late, if it is a suit for the recovery of a tax within the meaning of the statute. The petitioner insists that it is not such a suit, but one upon an account stated. The statement of an account gives rise to a new cause of action with a new term of limitation.

> *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265. We are thus brought to the question whether there was such a statement here.

See also *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276; *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d); *Phoenix State Bank & Trust Co.* v. *Bitgood*, 28 F. Supp. 899, 900 (D. Conn.).

The present proceeding, however, cannot be maintained as a suit on an account stated, so that the *Bonwit Teller* and like cases have no application here.[4] As pointed out in Judge Biggs' dissenting opinion, there are at least two reasons why this suit must fail if it is founded upon the theory of an account stated (R. 30–33). In the first place, the certificate of overassessment in this case cannot be treated as an account stated; and, in the second place, even if the certificate of overassessment could be regarded as an account stated, the District Court had no jurisdiction since the amount involved exceeds $10,000.

(a) The very foundation of a suit on an account stated is the theory that there has been an implied promise to pay, and it is upon that implied promise

[4] In its brief in the court below (p. 27) the taxpayer specifically stated that its action was not based upon an account stated. Yet its reliance upon the *Bonwit Teller* case and related decisions in its brief in opposition to certiorari so strongly resembles an argument based upon an account stated that we will here discuss the question for the convenience of the Court if it should be deemed to be in issue.

that suit is brought. See *Daube v. United States*, 289 U. S. 367, 372–373. But the certificate of overassessment in this case, far from permitting any inference of a promise to pay, contained affirmative evidence negativing such a promise. The certificate stated that there had been an overassessment of $14,833.68, but that refund would be allowable only in the amount of $1,362.50, and that the remaining $13,471.18 was barred by the statute of limitations (R. 19–24). It would require a most unwarranted distortion of the contents of the certificate of overassessment to imply a promise to pay the remaining $13,471.18. If anything, the certificate of overassessment says that the remaining $13,471.81 *will not* be paid.

That such a certificate will not support a suit on an account stated was recognized in *Marks* v. *United States*, 98 F. (2d) 564 (C. C. A. 2d), certiorari denied, 305 U. S. 652, where Judge A. N. Hand stated (pp. 567–568):

> We have considered the contention of the taxpayer that recovery should be allowed as upon an account stated because the Commissioner issued a certificate of overassessment in the amount of $9,375 and refused payment to the extent of $9,298.41 because of the statute of limitations. But no cause of action on an account stated was pleaded and the certificate of over-assessment did not impute a promise by the government to refund or by the taxpayer to accept the account as settled.

> On the contrary the certificate stated that the item of $9,298.41 was barred by the statute of limitations. *Stearns Co. of Boston* v. *United States,* 291 U. S. 54, 65, 54 S. Ct. 325, 78 L. Ed. 647. Such a certificate was not an account stated imputing a promise to repay $9,298.41.

To the same effect are *Stanley & Patterson* v. *United States,* 7 F. Supp. 281 (S. D. N. Y.), and *Hawkins* v. *United States,* 14 F. Supp. 429 (W. D. Pa.). Although the Court of Claims has ruled otherwise on this question,[8] we submit that the *Marks* case is plainly correct.

Since the essence of an account stated is an implied promise to pay, suit cannot be maintained where the promise cannot be implied, particularly where it affirmatively appears that there is no such promise. Moreover, this Court has indicated that it had gone far—possibly too far—in permitting the taxpayer to avoid the statutory limitations on tax-refund suits through the account-stated device. Speaking through Mr. Justice Cardozo in *Daube* v. *United States,* 289 U. S. 367, the Court said (pp. 372–373):

> High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended.

[8] *Goodenough* v. *United States,* 19 F. Supp. 254; *Wood* v. *United States,* 17 F. Supp. 521; *Weinburg* v. *United States,* 25 F. Supp. 83, certiorari denied, 306 U. S. 661.

> By the ruling in the *Bonwit Teller* case a specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid. As soon as this appears a fresh term of limitation is born and set in motion. *It is a ruling not to be extended* through an enlargement of the concept of an account stated by latitudinarian construction. [Italics supplied.]

Again, in *Stearns Co. v. United States,* 291 U. S. 54, the Court warned that a suit on an account stated with respect to federal taxes can be maintained only if the essentials are carefully complied with; and in detailing those essentials the Court stressed the very first requirement that "A balance must have been struck in such circumstances as to import a promise of payment * * *" (p. 65).

We therefore respectfully submit that, since there is wholly absent any basis for contractual liability, respondent cannot support its position here on the theory of an account stated.

(b) But even if the requirements of an account stated had been fully met, this suit would be defective because brought in the District Court rather than in the Court of Claims. The suit on an account stated is a proceeding on a contractual liability of the United States, not a suit for refund of taxes. The Tucker Act, however, gives the District Courts concurrent jurisdiction with the Court of

Claims only where the amount involved does not exceed $10,000. Here the respondent's claim is more than $13,000. The exception as to taxes where the collector is dead or out of office can have no application, for the very theory of a suit on an account stated is founded on contract and not on the overpayment of taxes. In order to invoke jurisdiction under this exception the suit must not only be one for taxes as such but it must also be such that it could have been maintained against the collector. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. In that case the Court said (p. 305):

> By the amendment of § 24 (20) the jurisdiction of district courts was extended so as to embrace suits against the United States to recover taxes "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax * * * was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced." Since the suit allowed against the collector before the amendment was based on his personal liability, * * * no such suit will lie unless he has collected the tax. The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit *previously allowed against the collector* whenever the amount claimed exceeds $10,000 and the collector is out of office. [Italics supplied.]

But suit upon an account stated will not lie against a collector, since he has no power to state

an account between the United States and the taxpayer, or any power to allow and make a refund of taxes. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302; *Daube* v. *United States,* 289 U. S. 367; *Moses* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *Otis Elevator Co.* v. *United States,* 18 F. Supp. 87 (S. D. N. Y.); *Gans S. S. Line* v. *United States,* 105 F. (2d) 955 (C. C. A. 2d), certiorari denied, 308 U. S. 613; *Arthur C. Harvey Co.* v. *Malley,* 60 F. (2d) 97 (C. C. A. 1st), rehearing denied, 61 F. (2d) 365, affirmed on other grounds, 288 U. S. 415. Since this action, if regarded as an action on an account stated, could not have been brought against the collector to whom the taxes were paid, the fact that the collector is dead or out of office does not enable the taxpayer to bring the suit against the United States in the District Court, notwithstanding the fact that the amount involved is in excess of $10,000. *Lowe Bros. Co.* v. *United States, supra.* The question here discussed was disposed of in accordance with the Government's contention by Judge Patterson in *Otis Elevator Co.* v. *United States, supra,* which raised the identical question. See also *Moses* v. *United States, supra.*

II

IN ANY EVENT, THIS SUIT CANNOT BE MAINTAINED BECAUSE THE 1929 CLAIM FOR REFUND UPON WHICH IT IS FOUNDED WAS UNTIMELY.

1. In Point I we contended that this suit is barred by Revised Statutes, Section 3226, since it

was not brought either within five years of payment or within two years of the disallowance of the claim for refund. We now contend that even if the suit were not barred by Section 3226, i. e., if, for example, it had been brought within two years after the Commissioner's disallowance of the claim for refund on September 9, 1929, then, nevertheless, the suit must fail because the claim for refund itself upon which the suit rests was untimely. The filing of a timely claim for refund is, of course, a prerequisite to the maintenance of the suit. *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141; *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

The claim for refund was filed in March 1929, and it asked for refund of the taxes paid for the year 1920. The respondent had paid $52,481.97 of its 1920 taxes during the year 1921, and had made an additional payment of $1,362.50 on July 28, 1926, with respect to the year 1920. The Commissioner of Internal Revenue allowed the claim for refund to the extent of $1,362.50, but ruled that the claim had been filed too late as to the remaining 1920 taxes, which the taxpayer had paid in 1921. We submit that, under Section 284 (b) and (g) of the Revenue Act of 1926 the Commissioner correctly held the 1929 claim for refund untimely as to taxes paid in 1921.

2. Although the taxes here involved were imposed by the Revenue Act of 1918, the applicable statute of limitations dealing with the timeliness of

the claim for refund is contained in the Revenue Act of 1926. The 1926 Act undertook not only to specify the limitations periods for taxes imposed by that Act, but also prescribed limitations periods for taxes imposed under prior Revenue Acts. The provisions of the 1926 Act which affect the present controversy are found in Section 284 (b) (1), (b) (2) and (g).

Section 284 (b) (1) provides that "No * * * refund shall be * * * made * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act [i. e., prior to the 1926 Act], unless before the expiration of such period a claim therefor is filed by the taxpayer." Thus, under these provisions, a claim is timely only if filed within four years of payment. Section 284 (g), however, extends the period in certain instances where a waiver had been filed. In reference to 1920 taxes, it provides:

> * * * If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *

Inasmuch as respondent had filed a waiver prior to June 15, 1926 (R. 9, 34), the four-year period with respect to its taxes paid in 1921 was thus ex-

tended to April 1, 1927, and it could have filed a claim for refund of those taxes at any time prior to that date. But the claim for refund in this case was filed on or about March 25, 1929 (R. 34).

The court below nevertheless held the claim timely on the ground that the additional payment of $1,362.50 in July 1926, started the four-year period running again, not only with respect to that payment but also with respect to the earlier payments made in 1921. It therefore concluded that the 1929 claim was timely as to the 1921 payments, simply because it had been filed within four years after the 1926 payment. In short, under the Court's ruling, a taxpayer could, by making relatively small additional payments from time to time, keep open almost indefinitely the period of limitations for recovery of taxes. An intention to permit such a result can scarcely be attributed to Congress where it was clearly endeavoring to enact provisions of repose.

But whatever doubt there may otherwise have been on this question is, we submit, dispelled by Section 284 (b) (2) which unambiguously provides:

> The amount of the * * * refund shall not exceed the portion of the tax paid during the * * * four years * * * immediately preceding the filing of the claim * * *.

Under this provision or corresponding provisions of other statutes it has repeatedly been held

that although a taxpayer's claim may be timely with respect to some of the payments of his income tax, he may not recover any amount in excess of payments made less than four years (or less than two or three years in respect to taxes for later years) prior to the filing of such claim. *San Joaquin Light & Power Corp.* v. *McLaughlin,* 65 F. (2d) 677 (C. C. A. 9th); *Thomas* v. *United States,* 18 F. Supp. 942 (C. Cls.); *Sugar Land Ry. Co.* v. *United States,* 48 F. (2d) 973 (C. Cls.); *Harr* v. *United States,* 20 F. Supp. 206 (E. D. Pa.); *Mohawk Rubber Co.* v. *United States,* 25 F. Supp. 228 (C. Cls.), certiorari denied, 307 U. S. 645.

However, by resorting to a most ingenious chain of reasoning, the court below refused to give effect to Section 284 (b) (2), thus defeating the obvious purpose of Congress. It held that the limitation upon the amount of overpayment refundable as provided in Section 284 (b) (2), while applicable to cases coming under Section 284 (b) (1), is inapplicable to cases within the provisions of Section 284 (g); that under Section 284 (g) the claim was timely if filed either by April 1, 1927, or within four years after the 1926 payment, since the term "tax" in Section 284 (g) means the whole tax and not a portion of the tax; and hence if the claim is filed within the time specified in Section 284 (g), recovery is not limited to the amount of tax paid within four years of filing of the claim (which amount has already been refunded here) but extends to the whole tax.

Precisely the same argument was rejected by the Court of Claims. *Weinburg* v. *United States,* 25 F. Supp. 83 (C. Cls.), certiorari denied, 306 U. S. 661; *Straus* v. *United States,* 25 F. Supp. 88 (C. Cls.), certiorari denied, 306 U. S. 661.

We submit that the construction which the Court of Claims placed upon Section 284 (g) is the only logical interpretation. Section 284 shows upon its face that subdivision (b) embodies the basic limitations upon (1) the time for filing claims, and (2) the amount which may be recovered with respect to any claim. Thus, Section 284 (b) provides that *except as provided in subdivisions (c), (d), (e), and (g) of this section,* (1) the claim must be filed within four years after payment of the tax, and (2) the refund shall not exceed the portion of the tax paid during the four years immediately preceding the filing of the claim. These are two distinct limitations, one stating when a claim for refund must be filed if *any* recovery may be had at all, and the other dealing with the *amount* recoverable. Subdivision (g) merely modifies (b) (1), by extending until April 1, 1927, the time within which a claim may be filed where there has been a waiver. But if the claim is not filed within that period, the taxpayer is relegated to the four-year limitation, and the amount recoverable is restricted by Section 284 (b) (2). The provisions of Section 284 (g) do not establish any exception

with respect to the amount to be recovered where the timeliness of the claim is dependent on the four-year after payment rule.

This construction is supported by the legislative history of the provision. Section 284 (b) of the Revenue Act of 1926 is the same for all material purposes as Section 281 (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, except that the latter referred to exceptions contained in subdivisions (c) and (e), subdivision (e) of Section 281 of that Act corresponding to subdivision (g) of Section 284 of the Revenue Act of 1926.

The Committee Reports under the Revenue Act of 1924 (H. Rep. No. 179, 68th Cong., 1st Sess., p. 27 (1939-1 Cum. Bull. (Part 2) 241); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 33-34 (1939-1 Cum. Bull. (Part 2) 266); H. Conference Rep. No. 844, 68th Cong., 1st Sess., pp. 24-25 (1939-1 Cum. Bull. (Part 2) 300)) do not throw much light on the relationship between Section 281 (b) and (e).[6] But the Senate and Conference Reports do indicate that in enacting Section 281 (b)

[6] Section 281 (e), the waiver section, had its origin in Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227, as amended by the Act of March 4, 1923, c. 276, 42 Stat. 1504, and by the Act of March 13, 1924, c. 55, 43 Stat. 22. (The latter is the amendment which added the waiver provisions resembling Section 284 (g).) Consequently, these waiver provisions were in the statute before any provision analogous to Section 281 (b) (2) appeared. This in itself affords some evidence that Section 281 (e) was not intended to limit Section 281 (b) (2).

(2) (which was added by the Senate) Congress meant to prevent the late payment of a small portion of the tax from extending the time for filing a claim for refund of the entire tax and accordingly limited the amount of tax to be recovered to the amount paid within four years of the filing of the claim. If such was the purpose of that provision and of the corresponding provision of the later acts, that purpose would be defeated if it were held that the payment of the additional assessment enables a taxpayer who did not file a claim for refund before April 1, 1927, to recover the original tax payments made many years before the claim was filed. The fact that a waiver was filed and that the time for filing the claim was therefore extended to April 1, 1927, should not change the result where the taxpayer has failed to avail itself of that concession. Cf. *Dubiske* v. *United States,* 98 F. (2d) 361 (C. C. A. 7th), certiorari denied, 305 U. S. 652.

The Committee Reports under the Revenue Act of 1926 show more clearly that in enacting Section 284 (g) Congress was concerned merely with giving the taxpayer at least until April 1, 1927, within which to file his claim for refund where he had filed a waiver, and was not in any way concerned with the extent of the recovery to be allowed on a claim filed after the extended period. In S. Rep. No. 52, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 332), the Senate

Finance Committee made the following explanation of this provision:

> Owing to the inability of the department to audit all the complicated returns for the years during and after the war period, the department early instituted a system of waivers of the statute of limitations against the Government. Under such waivers the Treasury could assess the tax, and meanwhile in some cases the statute had run against the taxpayer for filing a claim for refund. Congress has at various times recognized this situation by providing that where a waiver has been filed for a certain year then a reciprocal extension of the time for filing claims for credit or refund would be recognized. The committee recommends further extension of this system to take care of the taxable years 1920 and 1921. The statute of limitations for assessing 1920 taxes being five years and for 1921 taxes four years, the statute expired on the same day in the case of both years. It is provided in section 284 (g) that if the taxpayer before June 15, 1926, files a waiver for the years 1920 or 1921 then credit or refund for such years may be made if claim is filed before April 1, 1927, or within four years from the date the tax was paid.

It is obvious from this explanation that the primary purpose of Congress was to give the taxpayer who had filed a waiver additional time (extending to a few months beyond the waiver

period) within which he might file a claim so that he and the Government would be on a basis of equality. There was no reason why a taxpayer who did not avail himself of the privilege of filing a claim within this period should, upon filing a claim after that period, be permitted to recover 1920 taxes paid in 1921. The period of four years after the payment of the original tax, or April 1, 1927, whichever was later, gave such a taxpayer ample time within which to file a claim for the refund of those taxes, and the Government could not, after the waiver expired, assess any additional tax.

The taxpayer argued in the court below that subdivisions (c), (d), (c), and (g) are expressly excepted from Section 284 (b). On the contrary, Section 284 (b) merely states that except as otherwise provided in those subdivisions, Section 284 (b) applies. Moreover, subdivision (e) specifically provides that in the case of overpayments determined by the Board of Tax Appeals, the refund or credit shall be made either (1) if the claim was filed within the time prescribed in (b) or (g), or (2) if the petition was filed within four years after the tax was paid (in the case of taxes imposed under prior Acts). The provisions of subdivision (e), therefore, are clearly not exclusive of subdivision (b). But whether or not any one of these subdivisions may operate independently of subdivision (b) depends upon the wording of

the particular subdivision; that is, upon the extent to which it sets aside the general rules laid down in subdivision (b). Section 284 (g) does create a different rule with respect to claims filed prior to April 1, 1927, but does not alter the limitations of Section 284 (b) (2) in other respects. Cf. *United States* v. *Resler*, No. 616, present Term, decided April 14, 1941.

We submit, therefore, that the decision of the court below in this case is clearly erroneous and that the decision in the *Weinburg* case states the correct rule. The court below made no attempt to distinguish the *Weinburg* case and in fact failed to mention it. In the second opinion of the District Court the decision was disposed of summarily (R. 36–37) on the ground that the Court of Claims had relied heavily on the legislative history of a different statute. That reference was to the Court of Claims' discussion of the legislative history of Section 281 (b) (2) of the Revenue Act of 1924. But that provision is identical with Section 284 (b) (2) of the Revenue Act of 1926, and there is no material difference between Section 281 (e) of the 1924 Act and Section 284 (g) of the 1926 Act. The two cases cannot, therefore, be distinguished.

3. In holding that all of the tax for the year 1920 which had not previously been refunded could be recovered notwithstanding the fact that the amount already refunded equals the full amount of the tax

paid within four years of the filing of the claim, the court below relied upon *Hills* v. *United States*, 50 F. (2d) 302 (C. Cls.), affirmed on rehearing, 55 F. (2d) 1001; *United States* v. *Clarke*, 69 F. (2d) 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564; *Union Trust Co.* v. *United States*, 70 F. (2d) 629 (C. C. A. 2d), certiorari denied, 293 U. S. 564. But those cases have no application whatever here, since they involved, not refunds of income taxes, but refunds of estate taxes and hence were not affected by Section 284 (b) (2) of the Revenue Act of 1926, or the corresponding provisions of other acts.

In the *Hills* case the court held that under Section 3228 of the Revised Statutes, as amended (Appendix, *infra*), a claim for refund of estate taxes imposed by the Revenue Act of 1921 was timely if any part of the tax was paid within four years prior to the filing of the claim. But in so holding the court recognized that a different rule would apply to income taxes because Section 281 (b) (2) of the Revenue Act of 1924, which is identical with Section 284 (b) (2) of the Revenue Act of 1926, here involved, imposed a further limitation specifically designed to prevent a refund of any amount in excess of payments made more than the specified number of years immediately preceding the filing of the claim. The court further pointed out that Section 281 related exclusively to income and excess profits taxes and that the Revenue Acts

of 1921 and 1924 contained no limitations on refunds of estate taxes.

The decisions in *United States* v. *Clarke, supra; Union Trust Co.* v. *United States, supra; United States* v. *Magoon,* 77 F. (2d) 804 (C. C. A. 9th); and *Tait* v. *Safe Deposit & Trust Co. of Baltimore,* 78 F. (2d) 534 (C. C. A. 4th), all of which involve estate taxes, are also distinguishable for similar reasons.

Moreover, the *Hills* case and the cases which followed it were probably wrongly decided. For, even in the absence of provisions comparable to Section 284 (b) (2), it would seem quite plain that the period of limitations should run from the date of the payment sought to be recovered rather than from the date of payment of the last installment. The provisions of Section 284 (b) (2) were merely enacted out of an abundance of caution to forestall any such narrow and unreal interpretation of the statute as was adopted in the *Hills* decision. And under that decision, the rather absurd distinction sprang up between suits to recover income taxes and suits to recover estate taxes. The decision has been sharply criticized in *Brewer* v. *Nat. Life & Accident Ins. Co.* (C. C. A. 6th), decided April 17, 1941, not yet officially reported, but found in 1941 C. C. H., vol. 4, par. 9399. That such an illogical distinction could not long continue soon became evident, and Congress, in the Revenue Act

of 1932, placed estate and income taxes upon like footing with respect to the effect of the limitations period on the amount recoverable.[7]

But it is not necessary here to attack the *Hills* decision, for, as indicated above, the provisions of Section 284 (b) (2) specifically dispose of the very question that was there litigated in the absence of such provisions. The taxes which respondent seeks to recover were paid in 1921; the claim for refund was not filed before April 1, 1927, as permitted by Section 284 (g), nor was it filed within four years of payment of the amount sought to be recovered. The claim was therefore untimely under Section 284 (b) (2) as to the payment here in controversy. To refuse to apply the provisions of Section 284 (b) (2) by employing the *Hills* decision as a starting point for still further refinements, would seem to be an unwarranted disregard of the obvious purpose of Congress.

CONCLUSION

Not only has this suit been brought too late, but even if it had been instituted in time, it is nevertheless fatally defective because founded upon a claim

[7] Section 810 of the Revenue Act of 1932, c. 209, 47 Stat. 169, amended Section 319 (b) of the Revenue Act of 1926, and provided that the amount of the refund should not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim. Section 319 (b) of the 1926 Act, dealing with estate taxes, corresponded roughly to Section 281 (b) (1) of the 1924 Act and Section 284 (b) (1) of the 1926 Act dealing with income taxes.

for refund which itself was untimely. The judgment below should be reversed.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

APRIL 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid

during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver,

then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

* * * * *

REFUNDS

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refund or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the

Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C., Title 26, Sec. 1433.)[8]

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal

[8] Section 3228 of the Revised Statutes as thus amended was further amended by Section 619 of the Revenue Act of 1928, by striking out "except as provided in Sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." It was further amended by Section 1106 (a) of the Revenue Act of 1932 by adding at the end thereof the following:

"The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

Section 1106 (b) provided that this section should not bar from allowance a claim for refund filed prior to the enactment of this Act which but for such enactment would have been allowable.

Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 1672.)[9]

* * * * *

Judicial Code:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth: Concurrent with the Court of

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[9] Section 3226 of the Revised Statutes was further amended by Section 1103 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, so that in lieu of the last two sentences above quoted, the following sentence is substituted:

"No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

The amendment does not apply retroactively. See Section 1103 (b) of the 1932 Act.

Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * (U. S. C., Title 28, Sec. 41.)

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No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, Petitioner

v.

THE A. S. KREIDER COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DONALD HORNE
70 Pine Street
New York, N. Y.
Attorney for Respondent

Post Printing Company, Inc., 20 Lafayette Street, New York, N. Y.

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INDEX

CITATIONS

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UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The first opinion of the District Court (R. 25-26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27-33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34-37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41-46) is reported in 117 F. (2d) 133.

Statement of the Case.

Two omissions must be supplied in the statement of the case appearing on pages 3 and 4 of the petition herein.

The date of the filing by the respondent of the waiver of its right to have its taxes for the taxable year 1920 determined and assessed within five years after the return was filed, was prior to June 15, 1926 (R. 4, par. No. 3).

The collector of internal revenue by whom the tax in suit was collected was no longer in office at the time this suit was commenced (R. 3-4, par. No. 2).

Summary of the Argument

The respondent contends that there are no special and important reasons in this case to justify a request that this Court exercise its discretion in granting a writ of certiorari.

This case does not present such conflict of decisions as is contemplated in Rule 38, par. 5 of the Revised Rules of this Court, nor does it involve an important question of federal law not settled by this Court.

A claim for refund filed pursuant to the provisions of Sec. 284(g) of the Revenue Act of 1926 is timely if filed within four years after the payment of the final portion of the tax, and thereupon attaches to the entire tax, irrespective of the dates of payment of prior installments thereof.

This is a suit upon an allowed claim for refund, and not upon a rejected claim, and the suit was properly commenced within six years after the date of allowance, under the rule laid down by this Court in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, and this suit being for the recovery of an internal-revenue tax erroneously collected, and the collector of internal revenue by whom such tax was collected being no longer in office at the time this suit was commenced, the District Court had jurisdiction of the suit under the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20).

ARGUMENT

I

There are no special and important reasons in this case which call for the exercise of this Court's discretion in granting a writ of certiorari.

The decision of the Court below, and the decision of the District Court which was affirmed thereby, directly followed the decision of the Court of Claims in *Hills* v. *United States,* 50 F. (2d) 302, which is the leading case on the primary question of law involved herein. This question relates to the right of a taxpayer to a refund of his entire overpayment of tax if the claim for refund is filed within four years after the final portion of the tax is paid.

The Court below followed the *Hills* case and said:

> "By 'the tax', the entire tax for a particular year is meant and not merely some portion of it. The entire tax for the year is not paid until the last installment or deficiency assessment has been paid. Hills v. United States, 50 F. 2d 302, 305-307 (Ct. Cl.), confirmed on rehearing, 55 F. 2d 1001;" (R. 45)

The District Court had likewise followed the *Hills* case and said:

> "The Courts have uniformly ruled in cases involving the revenue acts that the time when the tax shall be deemed paid, for the purpose of statutes of limitation, is the date upon which the final payment was made, and the words 'the tax' refer to the entire tax and not a portion thereof. Hills v. U. S. 50 F. (2d) 302; sustained on reargument, 55 F. (2d) 1001;" (R. 36)

The Court of Claims subsequently, in the case of *Weinburg* v. *United States,* 25 F. Supp. 83, misapplied its own rule, and the Courts below differed with this misapplication.

Rule 38, par. 5, of the Revised Rules of this Court indicates the character of reasons which will be considered upon a request for the exercise of this Court's discretion in granting a writ of certiorari. One of these reasons is "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter".

It was not contemplated, under Rule 38, par. 5, that a writ of certiorari should issue to a circuit court of appeals because of a conflict of decision between that court and a district court, nor because of a conflict of decision between a circuit court of appeals and the Court of Claims. Rule 38, par. 5, only mentions a conflict of decision between a circuit court of appeals and another circuit court of appeals. Had this Court intended that a writ of certiorari should be issued to a circuit court of appeals because of a conflict between its decision and a decision of the Court of Claims, it would undoubtedly have said so in Rule 38, par. 5.

The Court of Claims is a lower court of original jurisdiction, and in this respect is in the same class as the district courts. In fact, under the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20) the Court of Claims and the district courts have concurrent jurisdiction in many cases. The circuit courts of appeal, on the other hand, are appellate tribunals and courts of record, and as such their decisions outrank the decisions of the Court of Claims.

No question of gravity and general importance is involved in the construction of Sec. 284 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 30), under the provisions of which the claim for refund herein was filed. This section relates to a special and limited group of cases involving the old excess-profits tax years 1917 to 1921, inclusive, where the taxpayers had filed waivers extending the Commissioner's time to determine and assess their taxes. This section has no applicability to refunds of taxes for any year subsequent to 1921, and no similar provision is contained in any revenue Act after the 1926 Act. Very

few cases, within the scope of this section, can still be open, and the amount involved in the instant case is comparatively small.

Unless a question of public importance is involved, the judicial discretion of this Court, in granting a writ of certiorari, will generally not be exercised.

This Court in the case of *Fields* v. *United States,* 205 U. S. 292, 296, said:

> "In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits."

The above rule was reiterated by Chief Justice Taft in the case of *Magnum Import Company, Inc.* v. *City,* 262 U. S. 159, 163, in which he said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The other question, involved herein, is the timeliness of the commencement of this suit, and the jurisdiction of the District Court thereof. The decision of the Court below on this question should not be reviewed by this Court by certiorari, because that decision of the Court below is not in conflict with applicable decisions of this Court, and does not involve a question which has not been, but should be, settled by this Court but, on the contrary, directly follows the decisions of this Court in the cases of *Bonwit*

Teller & Co. v. *United States*, 283 U. S. 258; *Bates Mfg. Co.* v. *United States*, 303 U. S. 567, and *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276.

II

Sec. 284 (g) of the Revenue Act of 1926 permitted the recovery of the tax paid in 1921 because the claim for refund was filed less than four years after the payment of the final portion of the tax.

Sec. 284(g) of the Revenue Act of 1926 relates to that special and limited class of cases, such as the instant case, involving refunds of income, war-profits, or excess-profits taxes for the years 1917 to 1921 only, in which the taxpayer filed a waiver extending the time for the determination and assessment of his taxes. The language of said section, to the extent that it is pertinent to our case, is as follows:

> "(g) * * * If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 * * * then such * * * refund relating to the taxes for such taxable year 1920 * * * shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid * * *."

The respondent filed a waiver prior to June 15, 1926 in respect of its taxes for the taxable year 1920, and paid its tax for that year on July 29, 1926, and filed a claim for refund thereof on March 23, 1929 or within four years from the time the tax was paid.

It is well settled that the date on which a tax is considered paid is the date on which the final portion of the tax is paid. The tax is not paid while any portion of it is still open. The tax is a single, unitary, indivisible liability which is paid only when the final payment is made and the obligation is discharged.

The Court of Claims, in the case of *Hills* v. *United States*, 50 F. (2d) 302, interpreted the similar provision of Sec. 3228 R. S. to the effect that a claim for refund of tax must be filed "*within four years next after payment of such tax,*" and held that the tax shall be deemed paid on the date upon which the final payment of the tax is made, and that the tax paid at that time is the entire tax and not a portion thereof.

The Court of Claims has followed this rule in the cases of *Haebler* v. *United States*, 8 F. Supp. 855, and *Safe Dep. & Trust Co.* v. *United States*, 9 F. Supp. 606.

The district courts have also followed this rule in *Safe Dep. & Trust Co.* v. *Tait*, 8 F. Supp. 634; *Union Trust Co.* v. *United States*, 5 F. Supp. 259; *Clarke* v. *United States*, 5 F. Supp. 292, and *Magoon* v. *United States*, 333 C. C. H. par. 9294.

The circuit courts of appeals have likewise followed the rule of the *Hills* case in *Clarke* v. *United States*, 69 F. (2d) 748, cert. denied, 293 U. S. 564; *Union Trust Co.* v. *United States*, 70 F. (2d) 629, cert. denied, 293 U. S. 564, and *Magoon* v. *United States*, 77 F. (2d) 804.

In *Union Trust Co.* v. *United States*, 70 F. (2d) 629, the Circuit Court of Appeals for the Second Circuit said, at page 630:

> "the tax liability is unitary and was not discharged until paid in full."

The petitioner, on pages 7 and 8 of its petition herein, concedes that the respondent, having filed a waiver prior to June 15, 1926, had at least until April 1, 1927 within which to file a claim for refund of its 1920 taxes. The opinion of the Court below shows that the petitioner admitted in that Court "that had the claim for refund been filed prior to April 1, 1927, a claim for the refund of the whole of the tax paid for the particular tax year could have been made" (R. 45). The petitioner, however, still contends, as it did in the Court below, that the payment of the final portion

of this tax in 1926 did not permit the taxpayer to file, within four years from that date, a claim for refund of the entire tax.

On page 9 of its petition, the petitioner attempts to uphold its contention by citing the Court of Claims decision in *Weinburg* v. *United States*, 25 F. Supp. 83.

The confusion on the part of the petitioner and the Court of Claims is caused by their failure properly to read the alternative provisions of Sec. 284(g) governing the filing of claims for refund. This alternative reads as follows:

> "* * * if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid * * *."

An examination of the definitions of the words used in this alternative phrase will make it apparent that the taxpayer must have the same rights under the second branch of the alternative as he has under the first branch.

Webster's New International Dictionary, Second Edition, Unabridged, gives the following definitions:

> "either, *conj.* * * *;—used before two or more coordinate words, phrases, or clauses which are joined by *or*;"

> "or, *conj.* A co-ordinating particle that marks an alternative; * * *

> "co-ordinate, *adj.* Equal in, or in the same, rank or order; not subordinate; * * *."

It is therefore obvious that the two branches of the alternative phrase, being preceded by the word "either" and joined by the word "or," are of equal rank and neither of them is subordinate to the other.

The Court below upheld this interpretation of this alternative clause, and said:

> "No plausible reason is advanced why a claim for refund for 1920 taxes under subsection (g) may be larger if filed on or before April 1, 1927, than if filed

after that date but within the equally permissible period of four years from the time the tax was paid. To reach such a conclusion would require that one of two co-ordinate clauses be treated as superior to the other" (R. 46).

The District Court ruled to the same effect and said:

> "Subdivision (g) provides that claim may be made *either* on or before April 1, 1927, *or* within four years from the time the tax was paid. With such phrasing, the Act clearly sets forth alternate and equal exceptions and to limit one and not the other would be a perversion of the language of the act itself.
>
> "Furthermore, if the provision 'or within four years from the time the tax was paid,' were construed as in the Weinburg case, the provision would thereby be rendered superfluous. Such a result is to be avoided wherever possible under the ordinary rules of statutory construction" (R. 37).

We might add that such a result should likewise be avoided under the ordinary rules of English grammar.

The independence of these two co-ordinate alternatives will be more clearly understood if it is borne in mind that the phrase containing the date April 1, 1927 is a reenactment and enlargement of the original provision of Sec. 252, of the Revenue Act of 1921 which provided that a claim for refund may be filed before the expiration of five years *from the date when the return was due,* and that the phrase "four years from the time the tax was paid" is a reenactment of the provision of Sec. 3228 R. S. permitting a claim to be filed within four years next *after payment of the tax.* These two provisions were always independent and co-ordinate.

Legislative History of Sec. 284 (g)

The above statement is readily supported by an examination of the legislative history of this section.

In January 1923, the filing of a claim for refund was governed by Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 24) and by Sec. 3228 R. S. as amended by the Revenue Act of 1921 (Appendix, *infra*, p. 24). Sec. 252 of the Revenue Act of 1921 provided that claim for refund must be filed before the expiration of *five years from the date when the return was due*, and Sec. 3228 R. S. contained the alternative provision that claims for refund must be filed *within four years next after payment of the tax.* This latter provision is the one which was interpreted by the Court of Claims in the case of *Hills* v. *United States, supra.* Hence at that time a claim for refund of income taxes could have been filed in the alternative, *either* five years after the return was due, *or* four years after the tax was paid.

The Commissioner had followed the practice of taking waivers from taxpayers to extend his time for making additional assessments, but it was doubtful whether these waivers were legally effective to extend the taxpayer's time to file a claim for refund. A taxpayer might sign a waiver extending the time for additional assessment, but if the final audit showed an overpayment of tax, the taxpayer might have no right to claim the refund.

To overcome this inequity, Congress on March 4, 1923 passed a special Act amending Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 26). This amendment inserted a clause in Sec. 252 to the effect that if a taxpayer had filed a waiver on his 1917 taxes, a claim for refund could be filed by him either *within six years after the return was due,* or *within two years after the tax was paid.*

This Act, therefore, enlarged the period after the return was due from five years to six years, but preserved the right of the taxpayer to file a claim within a given period after the tax was paid.

While the above Act of March 4, 1923 was still pending as a Bill in Congress, the Secretary of the Treasury wrote a letter, dated January 23, 1923, to the Acting Chairman

of the Committee on Ways and Means of the House of Representatives, in which he approved the proposed amendment. In this letter the Secretary referred to the then practice of his Department in the following words:

> "The present ruling of the Treasury Department is * * * that a refund * * * may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due."—Report of House Committee on Ways and Means—Internal Revenue Cumulative Bulletin, 1939—1 (Part 2), p. 849.

The Secretary, in a later portion of the same letter said as follows:

> "* * * consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due."—Same Report, p. 850.

After the enactment of this Act of March 4, 1923, the Commissioner of Internal Revenue issued a Treasury Decision explaining said Act, and said:

> "Until March 4, 1923, a claim for refund * * * could be allowed after five years from the date when the return was due, even though such claim was not filed by the taxpayer until after the expiration of the five years, if such claim was presented to the Commissioner of Internal Revenue within four years next after payment of the tax."—Treasury Decision 3462, II-1 Cumulative Bulletin, p. 180.

The Commissioner, in this Decision, then proceeded with an explanation of the Act of March 4, 1923, and stated that under it a claim could be filed by a taxpayer in the alternative of either six years after the return was due or two years after the tax was paid.

From the above it is obvious that the Secretary of the Treasury and the Commissioner of Internal Revenue recognized that it was the intent of Congress to permit a claim for refund to be filed within a given period after the tax was paid, even though that be after the the expiration of the fixed period after the return was due.

In 1924 the same situation arose with regard to taxes for 1918, and Congress passed the Act of March 13, 1924 (Appendix, *infra,* p. 26), further amending Sec. 252 of the Revenue Act of 1921, to grant a similar extension with respect to taxes for the year 1918, and an additional year for 1917 taxes.

The filing date of all 1918 returns had been extended by the Commissioner from March 15, 1919 to June 15, 1919. The Act of March 13, 1924 therefore set the filing date of 1918 waivers at June 15, 1924 or five years after the returns were filed. The filing date of all 1917 returns had been extended by the Commissioner from March 15, 1918 to April 1, 1918, hence the Act of March 13, 1924 set April 1, 1925 as the fixed date for the expiration of the seven year period after the 1917 returns were due and of the six year period after the 1918 returns were due.

Thereafter in all subsequent amendments of this provision, the date of April 1st of an appropriate year was used to designate the lapse of time after the return was due, and this date of April 1st still relates to the enlarged number of years after the due date of the return as distinguished from the period of years after the payment of the tax.

The provisions of Sec. 252 of the Revenue Act of 1921, as amended by the above two Acts, were carried forward into Sec. 281 of the Revenue Act of 1924 (Appendix, *infra,* p. 27). The 1923 and 1924 amendments became Sec. 281(e) of the Revenue Act of 1924, practically without change, except that the period of two years after the tax was paid, was changed to four years to conform to the period of time allowed in Sec. 3228 R. S.

Prior to the Revenue Act of 1924 there had been no restriction upon the amount that could be reached by a claim for refund. If the claim was filed within the statutory period after the payment of the final portion of the tax, it could reach the entire tax irrespective of the dates of payment of prior installments.

Sec. 281(b)(2) of the Revenue Act of 1924, for the first time placed a restriction upon refunds, by limiting general refunds to the portions of the tax paid during the four years immediately preceding the filing of the claim. Sec. 281(b), however, expressly excepted from its provisions the class of cases covered by subdivision (e). Congress took this means of preserving the rights of taxpayers who had filed waivers. Sec. 281(b)(2) of the Revenue Act of 1924, subsequently became Sec. 284(b)(2) of the Revenue Act of 1926, and Sec. 281(e) of the Revenue Act of 1924 subsequently became Sec. 284(g) of the Revenue Act of 1926.

In spite of the clear language of Sec. 284(b) which expressly excepts Sec. 284(g) from its provisions (Appendix, *infra*, p. 29), the petitioner, on pages 8 and 9 of the petition herein, claims that Sec. 284(g) of the Revenue Act of 1926 is restricted and qualified by Sec. 284(b)(2) of that Act.

The petitioner attempts to support its erroneous contention by relying upon one sentence from a paragraph of a report of the Senate Committee on Finance concerning the Revenue Act of 1924. This paragraph relates solely to Sec. 281(b) of the Revenue Act of 1924, and reads as follows:

> "Section 281(b): The limitation on credits and refunds contained in the first proviso of section 252 of the existing law was changed in the House bill in two principal respects. The date from which the period of limitation runs was changed from the due date of the return to the date of the payment of the tax. Logically the period of limitation should run from the

date of payment, since it is at that time that the right accrues. Again the complicated provisions of the present section with reference to the length of the periods of limitation, which vary from two years from the time the tax was paid to six years from the time the return was due, were simplified by fixing the period at four years. In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years immediately preceding the filing of the claim."—Report of Senate Committee on Finance—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 289.

The petitioner, toward the end of page 8 of its petition herein, uses the argument set forth in the last sentence of the above quoted paragraph as though it applies to Sec. 281(e) whereas it only applies to claims for refund filed pursuant to Sec. 281(b) and not to the special and limited class of cases covered by Sec. 281(e), which were expressly excepted from the provisions of Sec. 281(b). The petitioner also overlooks the very next paragraph of the same report, which relates to Sec. 281(e) and contains no such restriction. This paragraph reads as follows:

> "Section 281(e): This subdivision has been inserted by the committee, to provide that if the taxpayer has (1) within five years from the time his return for 1917 was due, filed a waiver of his rights to have the taxes due for that year determined and assessed within five years after his return was filed, or if he has (2) filed such a waiver on or before June 15, 1924, in respect of the taxes due for 1918, a credit or refund may be allowed if claim therefor is filed on or before April 1, 1925, or within four years after the tax was paid. Corresponding provisions are contained in an Act approved March 13, 1924."—Same report, p. 289.

The District Court, in its second opinion, was justified in stating that the final sentence of the first above quoted

paragraph relating to Sec. 281(b) dealt with a different statute and was not directed to the particular provision here involved (R. 36). Likewise the Court below was right, when it said in its opinion on the second appeal, that the scope and intendment of subsection (g) are separate and distinct from claims for credit or refund such as are dealt with in subsection (b) (R. 46).

Whether (b) and (g) be called subdivisions, subsections, or separate statutes, the fact remains that they are separate entities and are mutually exclusive. The independence of separately lettered subdivisions has been recognized by Congress. The Committee on Ways and Means of the House of Representatives once said:

> "* * * it was deemed advisable to subdivide section 252, as amended by this bill, into paragraphs (a), (b), (c), and (d) in order to avoid confusion in the administration of the same and to clarify the fact that each section is a separate entity."—Report of Committee on Ways and Means of House of Representatives—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 850.

Sec. 281(e) of the Revenue Act of 1924 was later amended by Act of March 3, 1925 (Appendix, *infra*, p. 28). This amendment extended this section to include taxes for the year 1919, and granted further time if the waiver filed by the taxpayer was extended.

Sec. 284 of the Revenue Act of 1926 (Appendix, *infra*, p. 29) carried forward the provisions of Sec. 281 of the Revenue Act of 1924, and Sec. 284(g) reenacted the previous Sec. 281(e) and extended this provision to cover the taxable years 1920 and 1921.

This chain of enactments was clearly made by Congress for the purpose of preserving the rights of taxpayers who had filed waivers. These taxpayers always had the right and Congress intended that they retain the right to file a claim for refund either within a fixed period after the due date of the return, which was set as April 1st of an appro-

priate year, or within the alternative given period after the payment of the tax, even though the second period of time extended beyond the expiration of the first. These two alternatives were always coordinate and independent.

The petitioner, on page 8 of its petition herein, concedes that a claim herein filed prior to April 1, 1927 pursuant to the provisions of Sec. 284(g), could reach the entire 1920 tax, and would not be restricted by Sec. 284(b)(2). It is equally true that the claim herein filed pursuant to the provisions of Sec. 284(g), prior to four years after the tax was paid, is likewise not restricted by Sec. 284(b)(2). As stated by the Court below, no plausible reason is advanced to the contrary (R. 46).

III

This suit was timely commenced within six years after the claim was allowed, and the District Court had jurisdiction.

The timeliness of this suit has been settled by this Court in the case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258.

The *Bonwit Teller* case involved a refund of taxes for the fiscal year ended January 31, 1919. Aside from the question of whether a certain letter written by the taxpayer to the Commissioner was the equivalent of a claim for refund, which was resolved in favor of the taxpayer, the pertinent facts were as follows:

On July 14, 1919 the taxpayer paid half of its taxes for the fiscal year ended January 31, 1919, and on December 13, 1919 it paid the remaining half.

On May 16, 1925 the Commissioner wrote to the taxpayer that he had found an overpayment of $10,866.43 for the year ended January 31, 1919, which could not be refunded unless the taxpayer filed a waiver before June 15,

1925 in accordance with Sec. 281(e) of the Revenue Act of 1924 as amended by the Act of March 3, 1925.

On May 23, 1925 the taxpayer filed the waiver.

On May 12, 1927 the Commissioner caused to be delivered to the taxpayer a certificate of overassessment showing the overassessment of $10,866.43 and also showing that of this amount the sum of $9,846.06 had been credited against an unpaid tax of that amount for the year ended January 31, 1917 and enclosing a check for $1,462.99 for the balance of the overassessment with interest.

The taxpayer claimed that the sum of $9,846.06 had been improperly withheld because it had been credited to the 1917 tax, collection of which had been barred by the statute of limitations.

More than two years after the issuance of the above certificate of overassessment and much more than five years after the year 1919 when the tax had been paid, the taxpayer commenced suit in the Court of Claims to recover the refund for the fiscal year ended January 31, 1919.

The government contended that under Sec. 3226 R. S. (Appendix, *infra,* p. 31) the suit was brought too late, because it had not been brought within five years after the date of the payment of the tax, nor within two years after the disallowance of the claim for refund. This is exactly the same contention raised by petitioner in the instant case on pages 9 and 10 of its petition herein.

This Court, in the *Bonwit Teller* case, overruled that contention of the government and held that the claim had not been disallowed but had been allowed, that the cause of action arose on May 12, 1927 upon the issuance of the certificate of overassessment and that the suit was timely commenced within six years after that date, and that neither the five year period after the payment of the tax, nor the two year period after a disallowance of a claim applied to that case. At page 265 of that decision this Court said:

"The government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by Rev. Stat. Sec. 3226, as amended. U. S. C. title 26, Sec. 156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The 'overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570, 24 L. ed. 792, 793; United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225. There is no merit in the contention that the suit is barred."

The rule laid down by this Court in the *Bonwit Teller* case is founded upon the provisions of Sec. 281(a) of the Revenue Act of 1924 (Appendix, *infra,* p. 27) which became Sec. 284(a) of the Revenue Act of 1926 (Appendix, *infra,* p. 29). This Sec. 284(a) provides that where there has been an overpayment of any income, war-profits, or excess-profits tax, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax *then due* from the taxpayer, and the balance shall be refunded *immediately* to the taxpayer.

Under this section, upon the determination of the overpayment and the issuance of the certificate of overassessment as evidence thereof, the refund became *immediately* due and payable, and the taxpayer's cause of action for the recovery thereof thereupon accrued.

When a taxpayer files a claim for refund the Commissioner must audit the account. If he finds that there was no overpayment he disallows the claim, and the taxpayer may have this finding reviewed in court by a suit on the disallowed or rejected claim.

If, on the other hand, the Commissioner finds that there was an overpayment of tax by the taxpayer, he must certify this finding, which he proceeds to do by a certificate of overassessment. This finding that there was an overpayment constitutes an allowance of the claim, and this Court so ruled in the *Bonwit Teller* case, and such finding remains an allowance of the claim to the full extent of the overpayment found, irrespective of any extraneous erroneous conclusion of fact or law that the Commissioner might have placed on the certificate.

Having certified the overpayment, the Commissioner has no further choice, and is not called upon to exercise any discretion, or to make any promise or agreement regarding the refund. He transmits his certificate to the Treasury and states thereon the amount of the overpayment and the existence of any other tax *then due* from the taxpayer. The mandate of Sec. 284(a) thereupon comes into play. The certificate is merely evidence of the Commissioner's findings and upon this evidence and pursuant to the mandate of Sec. 284(a), the Treasury completes the credit and must refund the balance *immediately* to the taxpayer.

The overpayment may only be credited to any tax then due. This does not permit the overpayment to be credited to a barred deficiency, because a barred deficiency is outlawed and is not *then due*. Therefore this Court found in favor of the taxpayer in the *Bonwit Teller* case, because the Commissioner had attempted, in violation of the clear mandate of the statute, to cause the overpayment to be credited to a barred deficiency which was not *then due*.

Under the rule in the *Bonwit Teller* case, the claim is none the less allowed in the full amount of the overpay-

ment found, even though the Commissioner placed on the certificate a statement that part of the overpayment had been credited against a tax then due, when such was not the fact because no tax was then due. Similarly, the claim is allowed in full, as in the instant case, even though the Commissioner erroneously placed on the certificate a statement that refund of part of the overpayment was barred by the statute of limitations, when such was neither the fact nor the law because the refund was not barred.

The Commissioner having made his findings of fact as to the existence of the overassessment, the overpayment became *immediately* due and payable to the taxpayer pursuant to the mandate of Sec. 284(a), and hence, at that time, the cause of action arose in favor of the taxpayer, as held by this Court in the *Bonwit Teller* case. This was a new cause of action arising under the provisions of Sec. 284(a), and was not the cause of action limited by Sec. 3226 R. S. This new cause of action therefore comes within the general limitation of the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20) and suit thereon may be commenced within six years after the right accrued, as held by this Court in the *Bonwit Teller* case.

This new cause of action does not arise from any promise, contract or agreement made by the Commissioner, but is based on the promise or the enactment of Congress contained in Sec. 284(a). The cause of action is nevertheless for the recovery of an internal-revenue tax erroneously collected within the meaning of those words as used in the Tucker Act.

The relevant facts in the instant case are the same as the facts in the *Bonwit Teller* case. The respondent's claim for refund was not disallowed, but was allowed. The facts in the instant case are possibly even stronger, because the portion of the overassessment, not refunded, was withheld by reason of a mistaken ruling that payment thereof was barred, while in the *Bonwit Teller* case the unpaid amount was credited to a barred deficiency of tax for another year.

In the instant case the certificate of overassessment was issued in October 1929 (R. 11, 19, 26—Petition, p. 4) and the cause of action arose on that date and not in 1921 as contended by the petitioner in the footnote on page 12 of its petition herein.

This suit was commenced on March 7, 1932 (R. 1—Petition, p. 3) less than six years after the cause of action accrued as required by the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20) and was therefore timely under the rule of the *Bonwit Teller* case.

The Tucker Act, as amended by Sec. 1310 of the Revenue Act of 1921 (Appendix, *infra,* p. 32), provides that the district courts shall have concurrent jurisdiction with the Court of Claims of any suit for the recovery of *any* internal-revenue tax erroneously collected, if the collector of internal revenue by whom such tax was collected is dead or not in office at the time such suit is commenced.

The instant suit was brought for the recovery of an internal-revenue tax, and the collector by whom such tax was collected was not in office at the time this suit was commenced (R. 34). The District Court therefore had jurisdiction of this suit under the Tucker Act.

The jurisdiction of the district courts in suits of this character has been directly upheld by this Court in the cases of *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276, and *United States* v. *Jaffray,* 306 U. S. 276, which were decided together.

In those cases the Commissioner issued certificates of overassessment, but credited portions of the overassessments against barred deficiencies for other years. This Court in sustaining the jurisdiction of the District Court, held th... the tax, sought to be recovered, had been collected by collectors of internal revenue who were either dead or out of office, and that the cases therefore fell within the very words of the Tucker Act, as amended.

The *Bonwit Teller* case was brought in the Court of Claims, but the same statute of limitations for commencing

suits applies in the District Court. This Court, in the case of *Bates Mfg. Co.* v. *United States*, 303 U. S. 567, speaking through Mr. Justice Black, said at page 570:

> "The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitation applicable alike 'to any or all' of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims."

And at page 571 this Court said:

> "The erection of barriers to recovery in the District Court which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimant in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation."

IV

Recapitulation

The conflict, if any, between the Circuit Court of Appeals for the Third Circuit, to which this writ of certiorari is requested, and the Court of Claims, is not such conflict of decision as is contemplated in Rule 38, par. 5, of the Revised Rules of this Court.

Sec. 284(g) of the Revenue Act of 1926 relates to a special and limited class of cases involving the taxable years 1917 to 1921, inclusive, where the taxpayers had filed waivers extending the time to assess the tax. There can be very few open cases involving the provisions of this section, and the amount involved in the instant case is comparatively small. The question involved is not one of gravity and general importance.

The question of the timeliness of the commencement of this suit and the jurisdiction of the District Court has been settled by this Court in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, and *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276.

The Court below was correct in following the decision of the Court of Claims in *Hills* v. *United States,* 50 F. (2d) 302, and the decisions of this Court in the *Bonwit Teller* and *Bertelsen & Petersen Co.* cases.

V

Conclusion

The application for a writ of certiorari herein should be denied.

Respectfully submitted,

Donald Horne,
Attorney for Respondent.

Appendix

Section 3228 of the Revised Statutes, as Amended by Sec. 1316 of the Revenue Act of 1921.

Sec. 1316. That Section 3228 of the Revised Statutes is amended to read as follows:

"Sec. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by Section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 314.

Section 252 of the Revenue Act of 1921.

REFUNDS

Sec. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act

of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of Section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under Section 252 of the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 268.

Act of March 4, 1923, Amending Sec. 252 of the Revenue Act of 1921.

That Section 252 of the Revenue Act of 1921 is amended to read as follows:

"Sec. 252(a) * * * *Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, such credit or refund shall be allowed or made if claim therefor is filed either within six years from the time the return for such taxable year 1917 was due or within two years from the time the tax was paid. * * *"

Chap. 276, 42 Stat. 1504, 1505.

Act of March 13, 1924, Amending Sec. 252 of the Revenue Act of 1921, as Amended.

That the second proviso of subdivision (a) of Section 252 of the Revenue Act of 1921 as amended by the Act entitled "An Act to amend the Revenue Act of 1921 in respect to credits and refunds," approved March 4, 1923, is amended to read as follows: "*Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within two years from the time the tax was paid."

Chap. 55, 43 Stat. 22.

Section 281 of the Revenue Act of 1924.

CREDITS AND REFUNDS.

Sec. 281(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed

such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

(f) * * * * *

Chap. 234, 43 Stat. 253, 301, 302.

Act of March 3, 1925, Amending Sec. 281(e) of the Revenue Act of 1924.

That subdivision (e) of Section 281 of the Revenue Act of 1924 is amended by adding thereto two new sentences to read as follows: "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919, shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919.

Chap. 435, 43 Stat. 1115.

Section 284 of the Revenue Act of 1926.

Credits and Refunds

Sec. 284(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) * * * * *

(f) * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relat-

ing to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

(h) * * * * *

Chap. 27, 44 Stat. 9, 66-68.

Section 3226 of the Revised Statutes, as Amended by Sec. 1014, of the Revenue Act of 1924.

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two

years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Chap. 234, 43 Stat. 253.

Tucker Act, Judicial Code, Sec. 24, as Amended by Sec. 1310 of the Revenue Act of 1921.

Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * * * *

(20) *Suits against United States*—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for

the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *

U. S. C., Title 28, Sec. 41, par. 20.

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FILE COPY

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, Petitioner

v.

THE A. S. KREIDER COMPANY

RESPONDENT'S BRIEF ~~IN OPPOSITION TO WRIT OF CERTIORARI~~

DONALD HORNE
70 Pine Street
New York, N. Y.
Attorney for Respondent

ALEXANDER LEVENE
of Counsel

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

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INDEX.

CITATIONS.

PAGE

Cases Cited:

CASES CITED (continued):

Cases Distinguished and Discussed:

Statutes:

STATUTES (continued):

STATUTES (continued):

MISCELLANEOUS:

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RESPONDENT'S BRIEF IN OPPOSITION TO THE WRIT OF CERTIORARI.

Opinions Below.

The first opinion of the District Court (R. 25-26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27-33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34-37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41-46) is reported in 117 F. (2d) 133.

Statement of the Case.

This is a suit brought to recover the amount of an overpayment of tax for the year 1920 (R. 4).

The respondent is a Pennsylvania corporation (R. 3) and was engaged in the business of manufacturing shoes (R. 12).

On March 15, 1921, the respondent filed its tax return for the calendar year 1920 (R. 3) and reported a tax liability of $52,481.97 which it paid in four installments on March 14, 1921; June 14, 1921; September 14, 1921, and November 13, 1921 (R. 3-4).

Prior to June 15, 1926, respondent filed a waiver of its right to have its taxes for the taxable year 1920 determined and assessed within five years after its return was filed (R. 4).

On April 10, 1926, the Commissioner of Internal Revenue advised respondent, by registered mail, of a deficiency for the year 1920 of $1,362.50 (R. 4).

In July 1926 said deficiency of $1,362.50 was assessed (R. 4).

On July 28, 1926 respondent paid said additional tax of $1,362.50 for the year 1920 (R. 4).

On or about March 23, 1929, and less than four years after the final portion of its tax for the year 1920 was paid, respondent filed a claim for refund for its entire tax for that year amounting to $53,844.47 (R. 4).

On September 9, 1929, the Commissioner signed a schedule of overassessment, and in October, 1929, he issued to respondent a certificate of overassessment which read in part as follows (R. 4, 11, 19-24, 26):

Tax assessed:

Original Account #422,472..............	$52,481.97
Additional July 1929, Page 1, Line 5 #2	1,362.50
Total assessment	53,844.47
Correct tax liability	39,010.79
Overassessment	14,833.68
Barred by Statute of Limitations	13,471.18
Overassessment allowable	1,362.50

Thereafter respondent received a refund of the sum of $1,362.50 and interest thereon (R. 4), but did not receive a refund of the balance of $13,471.18 of the overassessment (R. 4).

On March 7, 1932 respondent commenced this suit in the District Court for the Middle District of Pennsylvania for the recovery of said overpayment of tax of $13,471.18 for the year 1920 (R. 3).

The collectors of internal revenue by whom said tax was collected were not in office when this suit was commenced (R. 4).

Summary of the Argument.

This is a suit, brought in the District Court for the Middle District of Pennsylvania, for the recovery of an internal-revenue tax for the year 1920, erroneously collected.

Respondent's return for the year 1920 was filed March 15, 1921, and the tax reported thereon was paid during 1921. Prior to June 15, 1926 respondent filed a waiver extending the Commissioner's time to assess an additional tax.

On July 28, 1926 respondent paid an additional tax for the year 1920, and on March 23, 1929 respondent filed a claim for refund of its entire 1920 tax.

The Commissioner found an overpayment of $14,833.68 and issued his certificate of overassessment in said amount, but refunded only the sum of $1,362.50 paid on July 28, 1926 and refused to refund the balance of $13,471.18, paid in 1921, claiming that it was barred by the statute of limitations.

(1) Respondent contends that the Commissioner erred in stating that part of the refund was barred. That under Sec. 284(g) of the Revenue Act of 1926, the entire amount

of the 1920 tax was refundable under a claim filed within four years after the final payment was made, because respondent had filed a waiver prior to June 15, 1926. Sec. 284(g) provides that, in such case, the refund shall be made if the claim is "filed either on or before April 1, 1927 or within four years from the time the tax was paid."

Respondent contends that the tax was a single, unitary liability which was not paid until the final portion thereof was paid in 1926, and that the claim for refund, filed less than four years after said final payment, attached to the entire tax, irrespective of the dates of payment of prior portions thereof. Petitioner concedes that this would be true if the claim had been filed on or before April 1, 1927, but declines to give equal weight to the other co-ordinate phrase "or within four years from the time the tax was paid," and contends that the latter phrase is restricted by Sec. 284(b)(2) so that claims filed pursuant to the provisions of Sec. 284(g), within four years after the tax is paid, can only sustain a refund of the portions of the tax paid within four years prior to the filing of the claim, while claims filed on or before April 1, 1927 are not subject to such restriction. Respondent replies that Sec. 284(b) expressly excepts Sec. 284(g) from its restrictions, and there is no justification for according different weights to the two co-ordinate branches of the alternative phrase.

(2) Respondent further contends that this suit was timely commenced six years after the certificate of overassessment was issued by the Commissioner. Respondent relies upon the rule laid down by this Court in the case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, and the cases therein cited, to the effect that the issuance of the certificate of overassessment constituted an allowance of the claim for refund, which raised an implied promise on the part of the United States to pay any amount that might

actually be due the claimant, and that this promise constituted a new cause of action under the applicable internal revenue Act.

(3) Respondent also contends that this new cause of action was basically for the recovery of an internal revenue tax erroneously collected, within the meaning of the statute prescribing the jurisdiction of the district courts. The collectors of internal revenue by whom said tax was collected were not in office when this suit was commenced, hence the District Court had jurisdiction of this suit under U. S. C. Title 28, Sec. 41, par. 20. Respondent also contends that all decisions which hold that the district courts do not have jurisdiction of a suit of this type are in error, because they go on the theory that a suit in the district courts, against the United States, cannot be maintained for more than $10,000, unless it is a suit that could have been brought against the collector personally. They err in that they try to find a concurrence of jurisdiction within the district courts in suits against the United States and personal suits against collectors. This was not the intent of Congress in granting, to the district courts, jurisdiction of suits against the United States, because Congress expressly provided that such jurisdiction must be concurrent with the Court of Claims, and that Court has no jurisdiction of suits against collectors of internal revenue.

ARGUMENT.

I.

Sec. 284(g) of the Revenue Act of 1926 permitted the recovery of the tax paid in 1921 because the claim for refund was filed less than four years after the payment of the final portion of the tax.

Sec. 284(g) of the Revenue Act of 1926 relates to that special and limited class of cases, such as our case, involving refunds of income, war-profits, or excess-profits taxes for the years 1917 to 1921 only, in which the taxpayer filed a waiver extending the time for the determination and assessment of his taxes. The language of said section, to the extent that it is pertinent to our case, is as follows:

> "(g) * * * If the taxpayer has, on or before June 15, 1926 filed such a waiver in respect of the taxes due for the taxable year 1920 * * * then such * * * refund relating to the taxes for such taxable year 1920 * * * shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *"

The respondent filed a waiver prior to June 15, 1926 in respect of its taxes for the taxable year 1920, and paid its tax for that year on July 29, 1926, and filed a claim for refund thereof on March 23, 1929 or within four years from the time the tax was paid.

It is well settled that the date on which a tax is considered paid is the date on which the final portion of the tax is paid. The tax is not paid while any portion of it is still open. The tax is a single, unitary, indivisible liability which is paid only when the final payment is made and the obligation is discharged.

The Court of Claims, in the case of *Hills* v. *United States,* 50 F. (2d) 302, interpreted the similar provision of Sec. 3228 R. S. to the effect that a claim for refund of tax must be filed "*within four years next after payment of such tax,*" and held that the tax shall be deemed paid on the date upon which the final payment of the tax is made, and that the tax paid at that time is the entire tax and not a portion thereof.

The Court of Claims has followed this rule in the cases of *Haebler* v. *United States,* 8 F. Supp. 855, and *Safe Dep. & Trust Co.* v. *United States,* 9 F. Supp. 606.

The district courts have also followed this rule in *Safe Dep. & Trust Co.* v. *Tait,* 8 F. Supp. 634; *Union Trust Co.* v. *United States,* 5 F. Supp. 259; *Clarke* v. *United States,* 5 F. Supp. 292, and *Magoon* v. *United States,* 333 C. C. H. par. 9294.

The circuit courts of appeals have likewise followed the rule of the *Hills* case in *Clarke* v. *United States,* 69 F. (2d) 748; *Union Trust Co.* v. *United States,* 70 F. (2d) 629; and *Magoon* v. *United States,* 77 F. (2d) 804.

In *Union Trust Co.* v. *United States,* 70 F. (2d) 629, the Circuit Court of Appeals for the Second Circuit said, at page 630:

> "the tax liability is unitary and was not discharged until paid in full."

In our case the claim for refund was filed within four years from the time the final payment of the tax was made, and the Court below was therefore right in applying the rule of the *Hills* case, and in saying:

> "By 'the tax', the entire tax for a particular year is meant and not merely some portion of it. The entire tax for the year is not paid until the last installment or deficiency assessment has been paid. Hills v. United States, 50 F. 2d 302, 305-307 (Ct. Cl.), confirmed on rehearing, 55 F. 2d 1001;" (R. 45)

The District Court, in our case, was likewise right when it said:

> "The Courts have uniformly ruled in cases involving the revenue acts that the time when the tax shall be deemed paid, for the purpose of statutes of limitation, is the date upon which the final payment was made, and the words 'the tax' refer to the entire tax and not a portion thereof. Hills v. U. S., 50 F. (2d) 302; sustained on reargument, 55 F. (2d) 1001;" (R. 36).

The petitioner, at the bottom of page 29 and the top of page 30 and pages 32, 34 and 37 of its brief herein, concedes that, having filed a waiver prior to June 15, 1926, the respondent, at any time prior to April 1, 1927, could have filed a claim for refund of the portion of its tax paid in 1921, but contends that the respondent cannot recover that 1921 payment where the timeliness of the claim depends on the clause "or within four years from the time the tax was paid."

This attempted distinction is based upon the decision of the Court of Claims in the case of *Weinburg* v. *United States,* 25 F. Supp. 83, which is in conflict with the decision of the Court below. The Court of Claims, in the *Weinburg* case, held that the entire tax for the year 1917 could have been refunded, under Sec. 284(g) of the Revenue Act of 1926, if the claim for refund had been filed prior to April 1, 1925 (the equivalent date for 1920 taxes, in our case, is April 1, 1927). The Court of Claims said:

> "If he [the plaintiff] had filed his claim on or before April 1, 1925, he could have secured the refund of the entire overpayment, notwithstanding part of it was paid more than four years prior to that date."

The Court of Claims therefore ruled that, to this extent, Sec. 284(g) was excepted from the provisions of Sec. 284(b)(2) which restricted general refunds to the portion

of the tax paid during the four years immediately preceding the filing of the claim for refund.

The petitioner herein and the Court of Claims, in the *Weinburg* case, however, claim that the other branch of the alternative contained in Sec. 284(g), to the effect that the claim for refund may be filed "within four years from the time the tax was paid", was not excepted from the provisions of Sec. 284(b)(2).

The confusion on the part of the petitioner and the Court of Claims is caused by their failure properly to read the alternative provisions of Sec. 284(g) governing the filing of claims for refund. This alternative reads as follows:

> "* * * if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid * * *."

An examination of the definitions of the words used in this alternative phrase will make it apparent that the taxpayer must have the same rights under the second branch of the alternative as he has under the first branch.

Webster's New International Dictionary, Second Edition, Unabridged, gives the following definitions:

> "either, *conj.* * * *;—used before two or more coördinate words, phrases, or clauses which are joined by *or;*"

> "or, *conj.* A co-ordinating particle that marks an alternative; * * *

> "co-ordinate, *adj.* Equal in, or in the same, rank or order; not subordinate; * * *."

It is therefore obvious that the two branches of the alternative phrase, being preceded by the word "either" and joined by the word "or," are of equal rank and neither of them is subordinate to the other.

The Court below upheld this interpretation of this alternative phrase, and said:

> "No plausible reason is advanced why a claim for refund for 1920 taxes under subsection (g) may be larger if filed on or before April 1, 1927, than if filed after that date but within the equally permissible period of four years from the time the tax was paid. To reach such a conclusion would require that one of two co-ordinate clauses be treated as superior to the other" (R. 46).

The District Court ruled to the same effect and said:

> "Subdivision (g) provides that claim may be made *either* on or before April 1, 1927, *or* within four years from the time the tax was paid. With such phrasing, the Act clearly sets forth alternate and equal exceptions and to limit one and not the other would be a perversion of the language of the act itself.
>
> "Furthermore, if the provision 'or within four years from the time the tax was paid,' were construed as in the Weinburg case, the provision would thereby be rendered superfluous. Such a result is to be avoided wherever possible under the ordinary rules of statutory construction" (R. 37).

We might add that such a result should likewise be avoided under the ordinary rules of English grammar.

The independence of these two co-ordinate alternatives will be more clearly understood if it is borne in mind that the phrase containing the date April 1, 1927 is a reenactment and enlargement of the original provision of Sec. 252, of the Revenue Act of 1921 which provided that a claim for refund may be filed before the expiration of five years *from the date when the return was due,* and that the phrase "four years from the time the tax was paid," is a reenactment of the provision of Sec. 3228 R. S. permitting a claim to be filed within four years next *after payment of the tax.* These two provisions were always independent and coordinate.

Legislative History of Sec. 284(g).

The above statement is readily supported by an examination of the legislative history of this section.

In January 1923, the filing of a claim for refund was governed by Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 53) and by Sec. 3228 R. S. as amended by the Revenue Act of 1921 (Appendix, *infra*, p. 53). Sec. 252 of the Revenue Act of 1921 provided that a claim for refund must be filed before the expiration of *five years from the date when the return was due*, and Sec. 3228 R. S. contained the alternative provision that claims for refund must be filed *within four years next after payment of the tax*. (This latter provision is the one which was interpreted by the Court of Claims in the case of *Hills* v. *United States, supra*.) Hence at that time a claim for refund of income taxes could have been filed in the alternative, *either* five years after the return was due, *or* four years after the tax was paid.

The Commissioner had followed the practice of taking waivers from taxpayers to extend his time for making additional assessments, but it was doubtful whether these waivers were legally effective to extend the taxpayer's time to file a claim for refund. A taxpayer might sign a waiver extending the time for additional assessment, but if the final audit showed an overpayment of tax, the taxpayer might have no right to claim the refund.

To overcome this inequity, Congress on March 4, 1923, passed a special Act amending Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 55). This amendment inserted a clause in Sec. 252 to the effect that if a taxpayer had filed a waiver on his 1917 taxes, a claim for refund could be filed by him either *within six years after the return was due, or within two years after the tax was paid.*

This Act, therefore, enlarged the period after the return was due from five years to six years to correspond with the extension, by waiver, of the Commissioner's time to make

additional assessments, but preserved the right of the taxpayer to file a claim within a given period after the tax was paid.

While the above Act of March 4, 1923 was still pending as a Bill in Congress, the Secretary of the Treasury wrote a letter, dated January 23, 1923, to the Acting Chairman of the Committee on Ways and Means of the House of Representatives, in which he approved the proposed amendment. In this letter the Secretary referred to the then practice of his Department in the following words:

> "The present ruling of the Treasury Department is * * * that a refund * * * may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due."—Report of House Committee on Ways and Means—Internal Revenue Cumulative Bulletin, 1939—1 (Part 2), p. 849.

The Secretary, in a later portion of the same letter said as follows:

> "* * * consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due."—Same Report, p. 850.

After the enactment of this Act of March 4, 1923, the Commissioner of Internal Revenue issued a Treasury Decision explaining said Act, and said:

> "Until March 4, 1923, a claim for refund * * * could be allowed after five years from the date when the return was due, even though such claim was not filed by the taxpayer until after the expiration of the five years, if such claim was presented to the Commissioner of Internal Revenue within four years next after payment of the tax."—Treasury Decision 3462, II-1 Cumulative Bulletin, p. 180.

The Commissioner, in this Decision, then proceeded with an explanation of the Act of March 4, 1923, and stated that under it a claim could be filed by a taxpayer in the alternative—either six years after the return was due or two years after the tax was paid.

From the above it is obvious that the Secretary of the Treasury and the Commissioner of Internal Revenue recognized that it was the intent of Congress to permit a claim for refund to be filed within a given period after the tax was paid, even though that be after the expiration of the fixed period after the return was due.

In 1924 the same situation arose with regard to taxes for 1918, and Congress passed the Act of March 13, 1924 (Appendix, *infra,* p. 55), further amending Sec. 252 of the Revenue Act of 1921, to grant a similar extension with respect to taxes for the year 1918, and an additional year for 1917 taxes.

The filing date of all 1918 returns had been extended by the Commissioner from March 15, 1919 to June 15, 1919. The Act of March 13, 1924 therefore fixed the time limit for the filing of 1918 waivers at June 15, 1924 or five years after the returns were due to be filed. The filing date of all 1917 returns had been extended by the Commissioner from March 15, 1918 to April 1, 1918, hence the Act of March 13, 1924 set April 1, 1925 as the fixed date for the expiration of the seven year period after the 1917 returns were due and of the six year period after the 1918 returns were due.

Thereafter in all subsequent amendments of this provision, the date of April 1st of an appropriate year was used to designate the lapse of time after the return was due, and this date of April 1st therefore relates to the enlarged number of years after the due date of the return as distinguished from the period of years after the payment of the tax.

The provisions of Sec. 252 of the Revenue Act of 1921, as amended by the above two Acts, were carried forward

into Sec. 281 of the Revenue Act of 1924 (Appendix, *infra*, p. 56). The 1923 and 1924 amendments became Sec. 281(e) of the Revenue Act of 1924, practically without change, except that the period of two years after the tax was paid, was changed to four years to conform to the period of time allowed in Sec. 3228 R. S.

Prior to the Revenue Act of 1924 there had been no restriction upon the portions of the tax that could be recovered under a claim for refund. If the claim was filed within the statutory period after the payment of the final portion of the tax, it could reach the entire tax irrespective of the dates of payment of prior installments.

Sec. 281(b)(2) of the Revenue Act of 1924, for the first time placed a restriction upon refunds, by limiting general refunds to the portions of the tax paid during the four years immediately preceding the filing of the claim. Sec. 281(b), however, expressly excepted from its provisions the class of cases covered by subdivision (e). Congress took this means of preserving the rights of taxpayers who had filed waivers. Sec. 281(b)(2) of the Revenue Act of 1924, subsequently became Sec. 284(b)(2) of the Revenue Act of 1926, and Sec. 281(e) of the Revenue Act of 1924 subsequently became Sec. 284(g) of the Revenue Act of 1926.

In spite of the clear language of Sec. 284(b) which expressly excepts Sec. 284(g) from its provisions (Appendix, *infra*, p. 59), and in spite of the admission contained on page 37 of petitioner's brief herein, that "Section 284(g) does create a different rule with respect to claims filed prior to April 1, 1927," the petitioner herein, as did the Court of Claims, in the *Weinburg* case, claims that the second branch of the alternative contained in Sec. 284(g) of the Revenue Act of 1926 is restricted and qualified by Sec. 284(b)(2) of that Act.

The Court of Claims attempted to support its erroneous ruling by relying upon one sentence from a paragraph of a report of the Senate Committee on Finance concerning the

Revenue Act of 1924. This paragraph relates solely to Sec. 281(b) of the Revenue Act of 1924, and reads as follows:

> "Section 281(b): The limitation on credits and refunds contained in the first proviso of section 252 of the existing law was changed in the House bill in two principal respects. The date from which the period of limitation runs was changed from the due date of the return to the date of the payment of the tax. Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues. Again the complicated provisions of the present section with reference to the length of the periods of limitation, which vary from two years from the time the tax was paid to six years from the time the return was due, were simplified by fixing the period at four years. In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years immediately preceding the filing of the claim."—Report of Senate Committee on Finance—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 289.

The Court of Claims, in the *Weinburg* case, extracted out of its context, the last sentence of the above quoted paragraph, as though it applies to Sec. 281(e) whereas it only applies to general claims for refund filed pursuant to Sec. 281(b) and not to the special and limited class of cases covered by Sec. 281(e), which were expresly excepted from the provisions of Sec. 281(b). The petitioner, on page 34 of its brief herein, commits the same error. The Court of Claims also overlooked the very next paragraph of the same report, which relates to Sec. 281(e) and contains no such restriction. This paragraph reads as follows:

> "Section 281(e): This subdivision has been inserted by the committee, to provide that if the taxpayer has

(1) within five years from the time his return for 1917 was due, filed a waiver of his rights to have the taxes due for that year determined and assessed within five years after his return was filed, or if he has (2) filed such a waiver on or before June 15, 1924, in respect of the taxes due for 1918, a credit or refund may be allowed if claim therefor is filed on or before April 1, 1925, or within four years after the tax was paid. Corresponding provisions are contained in an Act approved March 13, 1924."—Same report, p. 289.

The District Court, in its second opinion was justified in stating that the final sentence of the first above quoted paragraph relating to Sec. 281(b) dealt with a different statute and was not directed to the particular provision here involved (R. 36). The District Court meant, of course, that Sec. 284(b) and Sec. 284(g) were different statutes or enactments. The District Court did not mean (as petitioner implies on page 37 of its brief herein) that the above quoted report related to the Revenue Act of 1924 and therefore did not apply to the Revenue Act of 1926.

The Court below was likewise right, when it said in its opinion on the second appeal, that the scope and intendment of subsection (g) are separate and distinct from claims for credit or refund such as are dealt with in subsection (b) and that the two are wholly unrelated provisions of the statute (R. 46).

Whether (b) and (g) be called subdivisions, subsections, unrelated provisions, or separate statutes, the fact remains that they are separate entities and are mutually exclusive. The independence of separately lettered subdivisions has been recognized by Congress. The Committee on Ways and Means of the House of Representatives once said:

"* * * it was deemed advisable to subdivide section 252, as amended by this bill, into paragraphs (a), (b), (c), and (d) in order to avoid confusion in the administration of the same and to clarify the fact that each section is a separate entity."—Report of Committee

on Ways and Means of House of Representatives—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 850.

The case of *United States* v. *Resler*, No. 616, present Term of this Court, decided April 14, 1941, and cited on page 37 of the petitioner's brief, does not support the petitioner's contention that Sec. 284(g) is qualified by Sec. 284(b) (2). In that case, this Court ruled on Sec. 212(b) of the Motor Carrier Act of 1935, which contains the preamble "Except as provided in section 213". This Court did not hold that Sec. 212(b) qualified Sec. 213. On the contrary, this Court held that "The phrase 'Except as provided in Sec. 213' was intended to remove from the sweep of Sec. 212(b) only those transfers which were within the compass of Sec. 213." Applying this rule to our case, the phrase contained in Sec. 284(b) of the Revenue Act of 1926 "Except as provided in subdivisions (c), (d), (e) and (g) of this section" removed from the sweep of Sec. 284(b) those cases which were within the compass of Sec. 284(g). Hence the sweep of the restriction contained in Sec. 284(b) (2) does not apply to any claims for refund filed within the compass of Sec. 284(g).

The petitioner, in footnote 6 on page 33 of its brief herein points out that Sec. 281(e) of the Revenue Act of 1924, hence also Sec. 284 (g) of the Revenue Act of 1926, originated in Sec. 252 of the Revenue Act of 1921, as amended, and was therefore in the statute before Sec. 281(b) (2) appeared. This statement is followed by the illogical conclusion that Sec. 281(e) was not intended to limit Sec. 281(b) (2). Sec. 281(e) does not limit Sec. 281 (b) (2) but is specifically excepted from the provisions of Sec. 281 (b) (2). The logical conclusion from petitioner's premises that Sec. 281(e) was the older enactment, and was reenacted and expressly excepted from the provisions of Sec. 281(b) (2), is that Sec. 281(b) (2) was not intended to limit Sec. 281(e).

Sec. 281(e) of the Revenue Act of 1924 was later amended by Act of March 3, 1925 (Appendix, *infra,* p. 57). This amendment extended this section to include taxes for the year 1919, and granted further time if the waiver filed by the taxpayer was extended.

Sec. 284 of the Revenue Act of 1926 (Appendix, *infra,* p. 58) carried forward the provisions of Sec. 281 of the Revenue Act of 1924, and Sec. 284(g) reenacted the previous Sec. 281(e) and extended this provision to cover the taxable years 1920 and 1921.

At this point reference might be made to the extract from the report of the Senate Committee on Finance on the Revenue Bill of 1926, quoted on page 35 of petitioner's brief. Petitioner states that the quoted paragraph shows a Congressional intent to give the taxpayer only until April 1, 1927 to file a claim if he had filed a waiver. The attention of the Court is respectfully called to the final clause of the quoted paragraph, which reads "if claim is filed before April 1, 1927, or within four years from the date the tax was paid".

The above chain of enactments was clearly made by Congress for the purpose of preserving the rights of taxpayers who had filed waivers. These taxpayers always had the right and Congress intended that they retain the right to file a claim for refund either within a fixed period after the due date of the return, which was set as April 1st of an appropriate year, or within the alternative given period after the payment of the tax, even though the second period of time extended beyond the expiration of the first. These two alternatives were always coordinate and independent.

The petitioner concedes that a claim herein filed prior to April 1, 1927 pursuant to the provisions of Sec. 284(g), could reach the entire 1920 tax, and would not be restricted by Sec. 284(b) (2). It is equally true that the claim herein filed pursuant to the provisions of Sec. 284(g), prior to

four years after the tax was paid, is likewise not restricted by Sec. 284(b) (2). As stated by the Court below, no plausible reason is advanced to the contrary (R. 46).

Applicability of the *Hills* Case.

The petitioner, on pages 37 to 40 of its brief herein, argues that the *Hills* case, and the other cases cited by respondent, do not apply to an income tax case because they all related to estate taxes. The same argument was urged by petitioner in the Court below.

The Court of Claims in the *Hills* case did state that a different rule would apply in refunds of income taxes because Sec. 281(b)(2) restricted them to the portions paid during the preceding four years. But that court spoke of the general claims for refund filed pursuant to the provisions of Sec. 281(b) and not to the special and excepted class of claims for refund filed pursuant to the provisions of Sec. 281(e).

Petitioner also points out that the *Hills* case adjudicated the provisions of Sec. 3228 R. S. and leaves the implication that the other cases, cited by respondent, also came under that section. But they did not. The case of *Clarke* v. *United States,* 69 F. (2d) 748 (C. C. A. 3d) involved the interpretation of Sec. 319(b) of the Revenue Act of 1926 which reads as follows:

> "(b) All claims for the refunding of the tax imposed by this title alleged to have been erroneously assessed or collected must be presented to the Commissioner within three years next after the payment of the tax."

Sec. 284(g) of the Revenue Act of 1926 is as much a separate entity from Sec. 284(b) of that Act, as is Sec. 319(b) of the same Act.

In fact the Government, in the case of *Clarke* v. *United States, supra,* argued that Sec. 284(b)(2) restricted the

amount of the refund recoverable under Sec. 319(b), but the Court refused to agree with that contention.

The only difference between the sections, adjudicated in the cases cited by respondent, and Sec. 284(g) is that in those sections the language used is *"years next after the payment of the tax"* while in Sec. 284(g) the language used is *"years from the time the tax was paid."* It is respectfully submitted that there is no legal difference between these two expressions.

The petitioner concludes its brief by conceding, on page 40, that it is not necessary to attack the *Hills* decision, and, in this the respondent agrees because the *Hills* decision is sound law, and has been uniformly followed.

II.

This Suit was Timely Commenced Within Six Years After the Claim Was Allowed.

The timeliness of this suit has been settled by this Court in the case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258.

This court at the beginning of its decision in the *Bonwit Teller* case said that the "action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919." Aside from the question of whether a certain letter written by the taxpayer to the Commissioner was the equivalent of a claim for refund, which was resolved in favor of the taxpayer, the pertinent facts were as follows:

On July 14, 1919 the taxpayer paid half of its taxes for the fiscal year ended January 31, 1919, and on December 13, 1919 it paid the remaining half.

On May 16, 1925 the Commissioner wrote to the taxpayer that he had found an overpayment of $10,866.43 for the year ended January 31, 1919, which could not be re-

funded unless the taxpayer filed a waiver before June 15, 1925 in accordance with Sec. 281(e) of the Revenue Act of 1924 as amended by the Act of March 3, 1925.

On May 23, 1925, and hence prior to June 15, 1925, the taxpayer filed the waiver.

On May 12, 1927 the Commissioner caused to be delivered to the taxpayer a certificate of overassessment showing the overassessment of $10,866.43 and also showing that of this amount the sum of $9,846.43 had been credited against an unpaid tax of that amount for the year ended January 31, 1917 and enclosing a check for $1,462.99 for the balance of the overassessment with interest.

The taxpayer claimed that the sum of $9,846.06 had been improperly withheld because it had been credited to the 1917 tax, collection of which had been barred by the statute of limitations.

More than two years after the issuance of the above certificate of overassessment and much more than five years after the year 1919 when the tax had been paid, the taxpayer commenced suit in the Court of Claims to recover the refund for the fiscal year ended January 31, 1919.

The Government contended that under Sec. 3226 R. S. (Appendix, *infra*, p. 60) the suit was brought too late, because it had not been brought within five years after the date of the payment of the tax, nor within two years after the disallowance of the claim for refund. This is exactly the same contention as is raised by petitioner in our case.

This Court, in the *Bonwit Teller* case, overruled that contention of the Government and held that the claim had not been disallowed but had been allowed, and that the cause of action arose on May 12, 1927 upon the issuance of the certificate of overassessment. This Court held that the case was not affected by either the special limitation of five years after the payment of tax, or the special limitation of two years after a disallowance of the claim, and that therefore the only limitation that applied to the case was the

general limitation of six years after the cause of action arose, to wit; six years after the date of the issuance of the certificate of overassessment. At page 265 of that decision this Court said:

> "The government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by Rev. Stat. Sec. 3226, as amended. U. S. C. title 26, Sec. 156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570, 24 L. ed. 792, 793; United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225. There is no merit in the contention that the suit is barred."

The *Bonwit Teller* case in holding that "Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought", reiterated a time-honored rule of law. As can be seen from the above quoted paragraph of the decision in that case, this Court supported that rule of law by citing *United States v. Kaufman,* 96 U. S. 567; *United States* v. *Real Estate Savings Bank,* 104 U. S. 728; and *Bank of Greencastle's Case,* 15 Ct. Cl. 225.

The *Kaufman* case was decided by this Court in 1877. The revenue law, at that time, provided that a brewer should pay a tax of $100., if he made more than 500 barrels of beer per year, and $50. if he made a smaller quantity. The regulations promulgated by the Commissioner of Internal Revenue, provided that a claim for refund might be filed, if the brewer found at the end of the year that he had made less than 500 barrels of beer. The plaintiff had paid the tax of $100. and applied for a refund of $50. The claim was allowed by the Commissioner, but the Treasury refused to pay the refund. Suit was commenced in the Court of Claims.

The Government defended on the ground that the Court of Claims had no jurisdiction.

This Court in the *Kaufman* case upheld the jurisdiction of the Court of Claims, upon the ground that said Court, had jurisdiction of "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." This Court, in that decision, at pages 569 and 570 said:

> "It would seem to be clear * * * that the allowance of a claim by the Commissioner of Internal Revenue, under the authority of these statutes and regulations, raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant under such circumstances, and certainly such a claim would be 'founded upon a law of Congress' ".
>
> * * * * *
>
> "To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake."

The *Real Estate Savings Bank* case was decided by this Court in the year 1881. That case also involved a suit in the Court of Claims for the refund of an overpayment of

tax, found by the Commissioner to be due, but payment of which was refused by the Treasury. This Court, in the *Real Estate Savings Bank* case, at page 733, citing the *Kaufman* case, said:

> "And we held that the allowance of a claim by the commissioner under this section was equivalent to an account stated between private parties, and binding on the United States, until in some appropriate form it is impeached for fraud or mistake, and that, if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because it raised an implied promise on the part of the United States to pay what might actually be due the claimant, and also because the claim therefor was founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court."
>
> * * * * *
>
> "All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the commissioner, the allowance may be used as the basis of an action against the United States * * *"

The *Bank of Greencastle's Case, supra,* was decided by the Court of Claims in the year 1879. In that case the Commissioner had allowed the claim for refund, but the Comptroller thereafter refused to pay it. The Court of Claims, at page 228, held that the Commissioner's decisions on claims for refund are in the nature of awards made by arbitrators. The Court, further at page 229, said:

> "But when the officer who is clothed with that power to adjust demands against the Government has allowed the claim and made his certificate to that effect, a new cause of action arises by implied contract or statute upon that certificate, into which the original demand is merged, and may be prosecuted to judgment in this court, if for want of an appropriation or other cause its payment is refused at the Treasury.

> These views have been sustained by the Supreme Court. (*Kaufman's Case,* 11 C. Cls. R. 659, affirmed on appeal, 96 U. S. 567; *Boughton's Case,* 12 C. Cls. R., 330; *Campbell's Case,* ib., 470; *Bradley's Case,* ib., 579; *De Celis's Case,* ib., 135; *McKnight's Case,* ib., 308; *Woolner's Case,* ib., 355; *Ramsay's Case,* ib., 367.)"

This Court, in the *Bonwit Teller* case, therefore merely followed the rule of law previously laid down in the above decisions.

The above rule of law to the effect that the allowance of the claim for refund by the Commissioner of Internal Revenue, raises an implied promise on the part of the United States to pay the amount actually due the claimant, which constitutes a new cause of action, is amply supported by the provisions of Sec. 281(a) of the Revenue Act of 1924 (Appendix, *infra,* p. 56) which became Sec. 284(a) of the Revenue Act of 1926 (Appendix, *infra,* p. 58).

This Sec. 284(a) provides that where there has been an overpayment of any income, war-profits, or excess-profits tax, the amount of such overpayment *shall* be credited against any income, war-profits, or excess-profits tax *then due* from the taxpayer, and the balance *shall* be refunded *immediately* to the taxpayer.

Under this section, upon the determination of the overpayment and the issuance of the certificate of overassessment as evidence thereof, the refund became *immediately* due and payable, and the taxpayer's cause of action for the recovery thereof thereupon accrued.

When a taxpayer files a claim for refund the Commissioner must audit the account and ascertain the taxpayer's true tax liability. This Court, in the case of *United States v. Memphis Cotton Oil Co.,* 288 U. S. 68, 70-71, said:

> "At once upon the filing of the claim for refund, there was an order for the complete examination of the business of the taxpayer, to the end that the net amount of its tax liability might be reported to the Bureau."

If upon this audit the Commissioner should find, as a fact, that there is no change in the taxpayer's tax liability as previously assessed, and hence there was no overpayment of tax, he disallows the claim and does not issue a certificate of overassessment. The taxpayer may, nevertheless, have this finding reviewed in court by a suit on the disallowed claim.

If, on the other hand, the Commissioner finds that there was an overpayment of tax by the taxpayer, he must certify this finding, which he proceeds to do by a certificate of overassessment. This finding that there was an overpayment constitutes an allowance of the claim, and this Court so ruled in the *Bonwit Teller* case, and such finding remains an allowance of the claim to the extent of the overpayment found, irrespective of any extraneous erroneous conclusion of fact or law that the Commissioner might have placed on the certificate.

If the function of the Commissioner be borne in mind, the distinction between an allowed claim and a disallowed claim will become obvious.

The Commissioner must audit the account to ascertain the true tax liability. If he finds that the amount previously assessed did not exceed the true tax liability, then he finds no overpayment and, naturally, does not issue a certificate of overassessment, but disallows the claim. The taxpayer may appeal to the courts, from this ruling, by suit upon the disallowed claim. In such suit the taxpayer has the burden of proving all the facts relating to his alleged true tax liability, so as to prove that there had been an overpayment of tax.

If, upon the audit, the Commissioner finds that the true tax liability was less than the amount of tax previously assessed; then he finds that there was an overpayment of tax and he issues his certificate of overassessment as evidence of this finding of fact. The taxpayer is thereupon entitled to the immediate refund of the overpayment. If the refund is not made, the taxpayer may sue upon the

allowed claim, and he need not prove any of the facts relating to his true tax liability, because the fact of the overpayment of tax has already been determined by the Commissioner.

When the Commissioner certifies the overpayment, he has no further choice, and is not called upon to exercise any discretion, or to make any promise or agreement regarding the refund. He transmits his certificate to the Treasury and states thereon the amount of the overpayment and the existence of any other tax *then due* from the taxpayer. The mandate of Sec. 284(a) thereupon comes into play. The certificate is merely evidence of the Commissioner's findings and upon this evidence and pursuant to the mandate of Sec. 284(a), the Treasury completes the credit and must refund the balance *immediately* to the taxpayer.

The overpayment may only be credited to any tax *then due*. This does not permit the overpayment to be credited to a barred deficiency, because a barred deficiency is outlawed and is not *then due*. Having found the fact of the overpayment of tax, the Commissioner has no authority under Sec. 284(a) to vitiate that finding by placing upon the certificate of overassessment a statement which is not true in fact.

Hence this Court, in the *Bonwit Teller* case held that a statement on the certificate of overassessment that part of the overpayment should be credited by the Treasury to a barred deficiency which was not *then due*, did not affect the certificate as an allowance of the claim for the full amount of the overpayment, and did not constitute a disallowance of the claim. It is respectfully submitted that all the decisions to the contrary are in error. A contention by the Commissioner that part of the overpayment should be credited against a deficiency for another year is merely a matter of defense, and does not destroy the taxpayer's cause of action. *United States* v. *Jaffray*, 306 U. S. 276, 282.

An erroneous statement, on the certificate of overassessment, that refund of part of the overpayment is barred by the statute of limitations, as in our case, likewise does not negative the allowance of the claim. *Wood* v. *United States,* 17 F. Supp. 521; *Clifton Mfg. Co.* v. *United States,* 19 F. Supp. 723; *Goodenough* v. *United States,* 19 F. Supp. 254; *Blue Jay Lumber Co.* v. *United States,* 27 F. Supp. 707. It is again respectfully submitted that all decisions to the contrary are in error.

The Commissioner having made his findings of fact as to the existence of the overassessment, the overpayment became *immediately* due and payable to the taxpayer pursuant to the mandate of Sec. 284(a), and hence, at that time, the cause of action arose in favor of the taxpayer, as held by this Court in the *Bonwit Teller* case. This was a new cause of action arising under the provisions of Sec. 284(a), and was not the cause of action limited by Sec. 3226 R. S. This new cause of action therefore comes within the general limitation of the Tucker Act, and suit thereon may be commenced within six years after the cause of action arose, as held by this Court in the *Bonwit Teller* case.

The relevant facts in our case are the same as the facts in the *Bonwit Teller* case. The respondent's claim for refund was not disallowed, but was allowed. The facts in our case are possibly even stronger, because the portion of the overassessment, not refunded, was withheld by reason of a mistaken ruling that payment thereof was barred, while in the *Bonwit Teller* case the unpaid amount was credited to a barred deficiency of tax for another year.

In our case the certificate of overassessment was issued in October 1929 (R. 4, 19, 26) and the cause of action arose on that date.

The suit was commenced on March 7, 1932 (R. 1), less than six years after the cause of action accrued and was therefore timely under the rule of the *Bonwit Teller* case, and under the provisions of the Tucker Act (U. S. C., Title 28, Sec. 41, par. 20).

Although the *Bonwit Teller* case was brought in the Court of Claims, the same statute of limitations for the commencement of suit must apply in the District Court. Both limitation provisions come down from the Second subdivision of the first section of the Tucker Act (Appendix, *infra*, p. 62).

Mr. Justice Black speaking for this Court in the case of *Bates Mfg. Co.* v. *United States*, 303 U. S. 567, very aptly said at page 570:

> "The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitation applicable alike 'to any or all' of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims."

And at page 571 of said decision this Court said:

> "The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. We find no support in the background or objective of the Act for a construction under which a claimant's rights would be preserved by filing a petition in the Court of Claims, but would be lost—without additional action—in the District Court."

Under the above decision of this Court, in the case of *Bates Mfg. Co.* v. *United States, supra,* this Court held that uniformity of opportunity for recovery must be afforded in the two forums to preserve "the symmetry of the plan."

III.

The District Court Had Jurisdiction of this Suit.

The Tucker Act, enacted March 3, 1887, c. 359, 24 Stat. 505 (Appendix, *infra,* p. 62) is often cited as though it prescribed only the jurisdiction of the district courts in suits against the United States, and as though it is synonymous with U. S. C., Title 28, Sec. 41, par. 20, which now prescribes said jurisdiction. This is not so.

The Tucker Act was entitled "An act to provide for the bringing of suits against the Government of the United States," and it primarily enlarged the then existing jurisdiction of the Court of Claims, and incidentally gave concurrent jurisdiction, with the Court of Claims, to the district courts, if the amount of the claim did not exceed $1,000, and to the circuit courts, if the amount of the claim exceeded $1,000 but did not exceed $10,000.

The Act in the First section, gave the Court of Claims jurisdiction of "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, * * *", and fixed the statute of limitations for commencing suit against the Government of the United States, at six years after the right accrued. In Sec. 2 said Act gave the district courts and circuit courts "concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section", within the limits, above mentioned, as to the amount of the claim.

The Judicial Code, enacted March 3, 1911, c. 231, 36 Stat. 1087, abolished the circuit courts, by Sec. 289, and split the provisions of the Tucker Act into several separate sections. The jurisdiction of Court of Claims was embodied in Sec. 145 (Appendix, *infra,* p. 63) in practically

the identical language of the Tucker Act, and the statute of limitations for suits in the Court of Claims was embodied in Sec. 156 (Appendix, *infra,* p. 63). The jurisdiction of the district courts was increased to $10,000, and was embodied in Sec. 24 par. 20 (Appendix, *infra,* p. 64) in substantially the same language as Sec. 145, and the statute of limitations for suits in the district courts was included in the same Sec. 24, par. 20.

The provisions of the Tucker Act, relating to the jurisdiction of the district courts, embodied in Sec. 24, par. 20 of the Judicial Code, were further amended on November 23, 1921 by Sec. 1310 of the Revenue Act of 1921, c. 136, 42 Stat. 227. This amendment enlarged the jurisdiction of the district courts by inserting, in Sec. 24, par. 20 of the Judicial Code, a clause which removed the limit of $10,000 in the specific type of suit for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, if the collector of internal revenue by whom such tax was collected is dead when the suit is commenced. *Schwab* v. *United States,* 17 F. (2d) 34.

By Act of February 24, 1925, c. 309, 43 Stat. 972, said section of the Judicial Code was further amended by inserting after the words "if the collector * * * is dead" the words "or is not in office."

These amendments completed the present language of Sec. 24, par. 20, of the Judicial Code, now U. S. C., Title 28, Sec. 41, par. 20 (Appendix, *infra,* p. 65) which is still commonly called the Tucker Act, and these amendments did not give the district courts any independent jurisdiction of suits against the Government of the United States, but still provided that the jurisdiction was concurrent with the Court of Claims.

The jurisdiction of the Court of Claims, and the statute of limitations for suits in that Court, contained in Secs. 145 and 156 of the Judicial Code are now Secs. 250 and 262 of U. S. C. Title 28 (Appendix, *infra,* p. 64).

Prior to the enactment of the Tucker Act, the jurisdiction of the Court of Claims was prescribed by Sec. 1059, Revised Statutes (Appendix, *infra*, p. 61) which was similar to the above opening words of section First of the Tucker Act except that it did not include claims founded upon "the Constitution of the United States." The six year statute of limitations for commencement of suits in the Court of Claims was then contained in Sec. 1069, Revised Statutes (Appendix, *infra*, p. 61).

Some courts have suggested that the specific type of suit, of which the district courts have unlimited concurrent jurisdiction, which is defined by the above amendments as "any suit or proceeding for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected" does not come within any of the general types of suit included in the statute before amendment. But the jurisdiction of the district courts over this specific type of suit is concurrent with the Court of Claims, and Sec. 145 of the Judicial Code does not contain language identical to the above. Therefore this type of suit must be included in the general type of "claims founded upon * * * any law of Congress, * * * or upon any contract, express or implied, with the Government of the United States * * *".

Suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected" are the same as suits for the recovery of refunds of overpayment of taxes.

Mr. Chief Justice Hughes, during his tenure as an Associate Justice of this Court in 1915, speaking for this Court in *United States* v. *Hvoslef*, 237 U. S. 1, said:

> "The various Acts of Congress for refunding of taxes erroneously collected arising out of war revenue Acts of 1898 created claims founded upon a 'law of Congress' within the meaning of the Tucker Act."

Our case was brought for a refund of a tax erroneously collected. It was based upon the implied promise of the

United States to make the refund, contained in a "law of Congress"—Sec. 284(a) of the Revenue Act of 1926—The implied promise, contained in this law, became effective upon the allowance of the claim for refund by the Commissioner of Internal Revenue, through his finding of fact that an overpayment had been made, as evidenced by the certificate of overassessment issued by him.

The Commissioner's finding that an overpayment had been made and his issuance of the certificate of overassessment as evidence of his finding brought into operation the mandate of Sec. 284(a) that the overpayment be refunded immediately to the taxpayer, which gave rise to the cause of action under the rule laid down by this Court in the *Bonwit Teller* case, and the cases therein cited.

This cause of action was not autogenous. It did not arise spontaneously. It arose upon a claim founded upon a "law of Congress"—a section of an Internal Revenue Act—. It was a cause of action for the recovery of an overpayment of tax.

It is inconceivable how this cause of action can be considered anything but an action for the recovery of an internal-revenue tax erroneously collected within the meaning of those words as used in the amendments to Sec. 24, par. 20, of the Judicial Code. It is the same type of cause of action, on an allowed claim, as was considered by this Court in the *Bonwit Teller* case, and this Court in the opening words of its decision in that case said:

> "This action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919, as determined by the Commissioner of Internal Revenue and shown in his certificate, No. 990,988 issued to plaintiff May 12, 1927."

It is interesting to note that the petitioner, in opening the Summary of Argument, at page 6 of its brief herein, cannot avoid saying "This is a suit to recover income taxes for the year 1920."

The Collector who collected this tax being dead or not in office when this suit was commenced, this suit is within the specific type of which the district courts have full, unlimited, concurrent jurisdiction with the Court of Claims, under the amendments to the Tucker Act.

The jurisdiction of the district courts over this type of suit has been sustained by this Court in the cases of *United States* v. *Bertelsen & Petersen Mfg. Co.*, 306 U. S. 276, and *United States* v. *Jaffray*, 306 U. S. 276, which were jointly decided. Those suits were brought for the recovery of overpayments of tax found by the Commissioner of Internal Revenue, and evidenced by certificates of overassessment issued by him, but erroneously credited by him against barred deficiencies for other years. To this extent the facts in those cases were substantially the same as the facts in the case of *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. In each of these three cases a claim for refund had been filed, and the Commissioner of Internal Revenue had found that the tax had been overpaid, and evidenced his findings by issuing a certificate of overassessment showing the amount of the overpayment. In each case the Commissioner had erroneously credited a portion of the overpayment against a barred deficiency for another year, a tax which was not *then due*. In each case the taxpayer sued to recover the amount of the overpayment which had thus been erroneously credited against the barred deficiency for another year.

This Court, in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases sustained the jurisdiction of the District Court under the Tucker Act, as amended, and held that the cause fell "within the very words of the amendment" of the Tucker Act.

It will be remembered that the *Bonwit Teller* case was commenced more than five years after the tax was paid and more than two years after the issuance of the certificate of overassessment and that the Government therefore con-

tended that the action was commenced too late under Sec. 3226 R. S. In the *Bertelsen & Petersen Eng. Co.* case the certificate of overassessment was issued on October 11, 1927, and the suit was commenced on September 19, 1929, or less than two years after the issuance of the certificate of overassessment. In the *Jaffray* case the certificate of overassessment was issued on August 16, 1933, and the suit was commenced on August 29, 1934, likewise less than two years after the issuance of certificate of overassessment.

Because of the fact that in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases, the actions were commenced less than two years after the issuance of the certificate of overassessment, the timeliness of the commencement of the suit was not involved, and neither of the parties in these two suits, on the appeal to this Court, cited the *Bonwit Teller* case in its brief, and this Court in its decision, did not consider the *Bonwit Teller* case, or the older cases there cited, and did not refer to the rule, therein laid down, that the certificate of overassessment constituted an allowance of the claim.

The question of the timeliness of the commencement of the suits not being involved, it made no material difference whether the claim was considered allowed or disallowed. In either respect the action was for the recovery of an internal revenue tax erroneously collected by a collector who was dead or not in office, and the District Court had jurisdiction. This Court, in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases stated that the crediting of a part of the overpayment against a barred deficiency for another year, constituted a disallowance of the claim for refund, but it is respectfully submitted that this decision is not to be considered as overruling the decision of this Court in the *Bonwit Teller* case, because the timeliness of the commencement of the action was not involved in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases.

The petitioner contended, in the Court below, and now contends, that the District Court had no jurisdiction under the Tucker Act, because our case is an action upon an account stated. The petitioner, in subdivision 4 of Point I, on pages 20 to 27, of its brief herein, tries to uphold the dissenting opinion of Judge Biggs upon the first appeal herein to the Court below, and cites the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Moses* v. *United States*, 61 F. (2d) 791, which was relied upon by Judge Biggs in said dissenting opinion.

Judge Biggs, in his said dissenting opinion in our case, upon the first appeal to the Court below (R. 32), cited the *Moses* case and said that a suit on an account stated cannot be brought against a collector, since the collector has no power to state an account between the United States and a taxpayer. There is some confusion in other courts on the proposition of a tax action upon an account stated. This is largely due to an improper reading of the decisions of this Court in the cases of *United States* v. *Kaufman*, 96 U. S. 567, *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, *Bank of Greencastle's Case*, 15 Ct. Cl. 225, *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258.

An account stated is a form of simple contract in which two contracting parties have agreed upon the balance due from the debtor to the creditor, and the debtor has agreed to pay this balance, and the creditor has agreed to accept it in full payment of the indebtedness. An account stated requires the presence of two parties who are able to enter into a contract, and a full meeting of their minds upon the terms of the contract.

In the *Kaufman* case this Court, at page 569 said that the allowance of a claim by the Commissioner of Internal Revenue raised *an implied promise on the part of the United States* to pay the amount due the claimant, and on page 570 said that such allowance is equivalent to an account stated between private parties.

This Court in the *Real Estate Savings Bank* case, at page 733 likewise said that the allowance of a claim by the Commissioner was equivalent to an account stated between private parties because it raised *an implied promise on the part of the United States* to pay what might actually be due the claimant.

In the *Bank of Greencastle's* case, at page 229, the Court of Claims said that when the claim is allowed and the certificate made, *a new cause of action arises by implied contract or statute* upon that certificate.

This Court in the *Bonwit Teller* case said that plaintiff sued upon the issue and delivery of the Commissioner's certificate and also sued upon an account stated, but this Court did not directly state that the action was upon an account stated. This Court merely said that upon delivery of the certificate to the plaintiff, there arose the cause of action upon which that suit was brought.

In any event, the basis of the suit is the *implied promise of the United States, contained in the statute* which directs the immediate payment of the refund after the Commissioner finds the fact of the overpayment. Even though this implied promise be considered equivalent to an account stated between private parties, it is still founded upon a "law of Congress" or a "contract, * * * implied, with the Government of the United States," within the meaning of the Tucker Act. It also remains a suit for a refund of an overpayment of tax, ~~or for the~~ recovery of an internal-revenue tax erroneously collected, within the meaning of the amendments to the Tucker Act.

As stated in the *Bonwit Teller* case, and the cases therein cited, the allowance of the claim gives rise to a new cause of action. But an account stated, of itself, cannot and does not create the liability. The account stated only determines the amount of the indebtedness where the liability already existed. *In re Merz* (C. C. A. 2), 45 F. (2d) 558; *Stocking* v. *Seed Filter & Mfg. Co., Inc.*, 175 App. Div. 812,

162 N. Y. Supp. 451; *Burroughs Adding Mach. Co.* v. *Hosack,* 224 App. Div. 583, 231 N. Y. Supp. 457. The account stated is an agreement between the parties regarding the amount due on past transactions. *Rodkinson* v. *Haecker,* 248 N. Y. 480, 485. The previous liability or the past transactions form the subject matter of the account stated. In a so-called "account stated" upon a tax liability, the certificate of overassessment fixes the amount of the overpayment of tax, but the liability of the Government for the erroneous collection of the overpayment still remains the subject matter of the account stated, and the district courts have jurisdiction thereof, under the Tucker Act. It was so held by the Circuit Court of Appeals for the Seventh Circuit, in the case of *C. T. C. Investment Co.* v. *United States,* 108 F. (2d) 383, where that Court, at page 386, said:

> "An admission of an indebtedness and an agreement to pay the amount due does not necessarily eliminate the tort claim out of which admission and agreement grew."

Although the allowance of the claim and the resulting account stated give rise to a new cause of action, the basis of the action is still the previous liability, or the tax which was erroneously collected, the amount of which was fixed by the account stated, and the district courts have jurisdiction of the action, under the Tucker Act, if the Collector by whom the tax was collected is dead or not in office.

The above quoted case of *C. T. C. Investment Co.* v. *United States,* 108 F. (2d) 383, likewise involved a certificate of overassessment and the District Court dismissed the complaint for lack of jurisdiction under the Tucker Act upon the ground that the claim was based on an implied promise of the Government evidenced by the certificate of overassessment. The Circuit Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, and

after quoting the text of the Tucker Act, the Court, at page 385 said:

"Its [the Government's] argument is that the complaint sets forth an agreement arising out of an implied agreement to pay, which in turn is predicated on the Government's certificate of over-assessment. The heart of the argument lies in the assertion that the issuance of the Government's certificate of over-assessment crystallized the taxpayer's claim into a new cause of action—a cause of action based on contract. Bonwit Teller & Co. v. U. S., 283, U. S. 258, 51 S. Ct. 395, 75 L. Ed. 1018 is relied on. In short, plaintiff's cause of action is not predicated upon a claim of taxes illegally assessed and collected by the Government, which is the only basis for the District Court's jurisdiction where the amount exceeds $10,000., but is one arising out of the Government's implied promise to pay.

"We are of a different opinion. In other words, we are satisfied that Section 41(20) Title 28 U. S. C. A. invested the District Court with jurisdiction of plaintiff's cause of action."

The Court further, on page 386, said:

"We are not convinced that a fair construction of the statute did not give to plaintiff the right upon the facts here disclosed, to sue on either theory—tort or contract—in the District Court, even though its claim exceeded $10,000. For the amendment to this Act represented by the words beginning with 'and of any suit' and continuing to the end of the section dealt with claims of a particular kind, to-wit, 'for the recovery of any internal revenue tax alleged to be erroneously or illegally assessed or collected.' The amendment having made a particular exception and having covered specific claims,—claims which arise out of overpayment of taxes, it should be construed to cover any claims of the class designated. The amendment was specific; it included 'any' claim for the overpayment of taxes. It therefore included those termed *ex contractu*, as well as claims *ex delicto—Generalia specialibus non derogant.*"

The decision of the Circuit Court of Appeals for the Second Circuit, in the case of *Moses* v. *United States*, 61 F. (2d) 791, is not sound law, and is in direct conflict with the later decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *C. T. C. Investment Co.* v. *United States, supra,* and with the later decision of the Court below in our case.

The decision of the Circuit Court of Appeals for the Second Circuit, in the *Moses* case, was cited by the petitioner herein, in its brief and upon its argument in the Court below, but apparently carried no weight with that Court, for it decided that this suit was for the recovery of a tax erroneously assessed and collected, and that the Collectors to whom the tax had been paid were no longer in office, and that the District Court therefore had jurisdiction (R. 46).

The said decision of the Circuit Court of Appeals for the Second Circuit, in the *Moses* case, was also cited and relied upon by the Government in case of *C. T. C. Investment Co.* v. *United States, supra,* before the Circuit Court of Appeals for the Seventh Circuit, but that Court also refused to follow it and sustained the jurisdiction of the District Court.

In this Court, in the case of *United States* v. *Bertelsen & Petersen Eng. Co.,* 306 U. S. 276, the Government also argued that the District Court had no jurisdiction and supported this argument by the *Moses* case, but this Court held that the action was properly brought in the District Court under the Tucker Act.

The Circuit Court of Appeals for the Second Circuit, in the case of *Gans Steamship Line* v. *United States,* 105 F. (2d) 955, itself seemed to deviate from its decision in the *Moses* case. The facts in the *Gans Steamship Line* case are set forth in the opinion of the District Court reported in 26 F. Supp. 976. The action was brought to recover an overpayment of 1917 tax fixed in amount by a

certificate of overassessment and credited against an allegedly barred deficiency for 1919. The Circuit Court of Appeals for the Second Circuit upheld the jurisdiction of the District Court, and said, at page 956:

> "This action seeks recovery of taxes illegally collected for the year 1917—not 1919 (the year to which the 1917 overpayment was credited). Hence the suit might have been brought against the collector to whom payment was made; and he being out of office, it may be brought against the United States pursuant to paragraph 20 of section 24 of the Judicial Code, as amended, 28 U. S. C. A. §41 (20). United States v. Bertelsen & Petersen Engineering Co., 306 U. S. , 59 S. Ct. 541, 83 L. Ed. ."

The further facts, in the *Gans Steamship Line* case, were that the final payment of the 1917 tax was made on February 21, 1924, the certificate of overassessment was issued on October 28, 1925, and the action was commenced, in the District Court, on January 2, 1936, or more than eleven years after the tax was paid and more than ten years after the certificate of overassessment was issued. The suit was therefore commenced too late both under the provisions of Sec. 3226 R. S. and under the Tucker Act. Upon these facts alone, judgment should have been rendered in favor of the Government, because the action was not timely commenced under any theory.

Instead of directly so deciding, the Circuit Court of Appeals for the Second Circuit erroneously proceeded to designate as dictum the rule laid down by this Court in the *Bonwit Teller* case, that the crediting of an overpayment against a barred deficiency for another year is not a disallowance of the claim for refund.

This erroneous statement, that this ule laid down by this Court, in the *Bonwit Teller* case, was dictum, was based by the Circuit Court of Appeals for the Second Circuit upon the erroneous reference to the *Bonwit Teller*

case contained in the decision of *John T. Jelke Co.* v. *Smietanka,* 86 F. (2d) 470. That latter case, at page 473, erroneously stated that this Court's conclusion, in the *Bonwit Teller* case, was that a suit based upon determination and certification by the Commissioner that the taxpayer was entitled to a refund of a specific amount, is not barred by Sec. 3226 R. S. but rather only by a lapse of five years from the payment of the tax.

This Court made no such statement, in the *Bonwit Teller* case, but, on the contrary, expressly held that the passing of five years after the payment of the tax did not bar the suit, and that the suit was timely commenced six years after the date of the delivery of the certificate of overassessment to the plaintiff.

The Circuit Court of Appeals for the Second Circuit, in the *Moses* case, also claimed that the District Court has no jurisdiction of a suit such as the *Bonwit Teller* case, because the liability rests upon an implied promise to pay, and a Collector cannot be sued on such implied promise for he can neither allow a refund nor draw money from the Treasury to pay it. That Court overlooked the fact that the Collector likewise cannot disallow a claim for refund, but, nevertheless, can be personally sued for the erroneous collection of the tax, after the disallowance of the claim. After the issuance of a certificate of overassessment by the Commissioner, the Collector can still be personally sued for the erroneous collection of the tax in spite of the implied promise on the part of the United States to repay it.

The *Moses* case quoted and relied on *Arthur C. Harvey Co.* v. *Malley,* 60 F. (2d) 97, which erroneously denied jurisdiction to the district courts on the ground that the Collector had nothing to do with issuing the certificate of overassessment and was not privy to the promise. There is no such requirement in the Tucker Act.

These and several other similar decisions of the lower courts fall into the error of misreading the conditions which define the specific type of suit against the United States of

which the district courts, under the amendments to the Tucker Act, have unlimited concurrent jurisdiction with the Court of Claims. These two conditions are (1) that the suit must be for the recovery of any internal-revenue tax erroneously collected, and (2) that the Collector by whom the tax was collected should be dead or not in office.

There can be no question that prior to the amendments to the Tucker Act, the district courts had and still have concurrent jurisdiction with the Court of Claims of every type of suit against the United States, including a suit upon an implied promise of the United States to refund an overpayment of tax, provided the suit in the District Court was for not more than $10,000. The amendments removed this limit in *any* suit for the recovery of *any* internal-revenue tax erroneously collected, if the above two conditions existed. A suit for the recovery of an internal-revenue tax erroneously collected is a suit for refund, and the United States could not be sued for a refund unless some "law of Congress" contained an implied promise to refund the overpayment of tax.

Those decisions which deny, to the district courts, jurisdiction of suits for the recovery of a refund of tax, based on an implied promise of the United States to repay the amount rightfully due the claimant, attempt to reason that such suit is based on contract, and that the 1921 amendment to the Tucker Act, which permitted suits to recover taxes erroneously collected, only covers suits based on tort. But Congress, in the Tucker Act, did not intend that the United States might be sued, in the Court of Claims, on a tort cause. The Tucker Act permits suits on claims founded upon the Constitution, any law of Congress, executive regulation, contract, express or implied, or for damages *in cases not sounding in tort.*

A suit against a collector for an erroneous collection of tax is a common law suit based on his tort. A suit against the United States for the recovery of a tax erroneously collected is a suit for the refund of the overpayment of tax,

and is not based on the tort of the collector, but must always be based on the implied promise of the United States to make the refund, contained in a "law of Congress"—an internal revenue act—.

The petitioner, the *Moses*, and *Arthur C. Harvey Co.* v. *Malley*, and other similar cases completely lose sight of the purpose of the amendments to the Tucker Act, They look for a concurrence of jurisdiction within the district courts between suits against the United States and personal suits against collectors of internal revenue. No such concurrence was within the contemplation or intent of the amendments to the Tucker Act. The Court of Claims has no jurisdiction of personal suits against a collector of internal revenue, and the United States did not permit itself to be sued in the district courts in a type of suit of which the Court of Claims did not have concurrent jurisdiction.

The entire theory that a suit against the United States in the district courts for the recovery of an internal revenue tax erroneously collected, must be a type of suit which could be brought against a collector of internal revenue, of which the Court of Claims has no jurisdiction, is abhorrent to what Mr. Justice Black, in the case of *Bates Mfg. Co.* v. *United States*, 303 U. S. 567, 570, called "the symmetry of the plan."

As a further argument against the *Moses* and *Arthur C. Harvey Co.* v. *Malley* cases, it may be pointed out that the Commissioner of Internal Revenue is likewise not privy to the implied promise on the part of the United States to pay the amount due the taxpayer. The Commissioner has only the right to make the finding of fact as to the existence of the overpayment, but has no authority, by himself, to make a contract with a taxpayer with reference to a tax liability, whether the contract be an account stated or in any other form. Only with the advice and consent of the Secretary of the Treasury, can the Commissioner make a binding contract with reference to a tax liability.

It was so held by this Court, in the case of ***Botany Worsted Mills* v. *United States,*** 278 U. S. 282. This Court there held that the Commissioner has no right to enter into any agreement with the taxpayer as to the taxpayer's tax liability, except in conformity with Sec. 3229 R. S. or Sec. 1106(b) of the Revenue Act of 1926. This statutory permission provides that the Commissioner of Internal Revenue may enter into a closing agreement with the advice and consent of the Secretary of the Treasury, and this Court held, in the ***Botany Worsted Mills*** case that an agreement by the Commissioner of Internal Revenue is not valid unless so made with the advice and consent of the Secretary of the Treasury. Certificates of overassessment, are not made with the advice and consent of the Secretary of the Treasury, and therefore cannot be considered contracts made by the Commissioner of Internal Revenue. They merely constitute findings of fact made by the Commissioner, which under the mandate of the statute—Sec. 284(a) of the Revenue Act of 1926—give rise to an implied promise by the United States to refund the overpayment immediately, and thereby form the basis of the cause of action. The Commissioner is not a party to the implied promise or contract which is considered equivalent to an account stated between private parties. The parties to the implied account stated are the United States and the taxpayer.

Our case is for the recovery of an internal revenue tax alleged to have been erroneously collected, as to which the United States admitted liability and which it promised, by statute, to repay, and there is no justification, under the Tucker Act, for endowing the Collector, who collected it, with any undue importance, for the purpose of vesting unlimited jurisdiction in the District Court, except that he must be dead or not in office.

This Court, in the case of ***Moore Ice Cream Co.* v. *Rose,*** 289 U. S. 373, held that when a tax has been duly assessed by the Commissioner of Internal Revenue, the Collector is under a ministerial duty to proceed to collect it. There

is nothing left to his discretion. His duty being imperative, he is protected by the command of his superior from liability for trespass. Along with the duty, there went a pledge of indemnity by the Government itself. His function, in the repayment of an internal revenue tax which had been erroneously collected, is inconsequential. At pages 382, 383, this Court said:

> "A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomolous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. Philadelphia v. Collector (Philadelphia v. Diehl), supra (5 Wall. p. 731, 18 L. ed. 606). There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."

Our case is clearly within that special type of suit of which the district courts have unlimited concurrent jurisdiction with the Court of Claims, for it is a suit based on a claim founded upon a "law of Congress"—Sec. 284(a) of the Internal Revenue Act of 1926—for the recovery of an internal revenue tax alleged to have been erroneously collected, and the collector of internal revenue by whom the tax was collected was dead or not in office when this suit was commenced. As said by this Court in the case of *United States* v. *Bertelsen & Petersen Eng. Co.*, 306 U. S. 276, our cause "falls within the very words of the amendment of the Tucker Act."

The United States, as a sovereign, may only be sued in such manner as it may permit. Under the Tucker Act it permitted itself to be sued, in a District Court, for the recovery of an erroneously collected internal revenue tax, without limit as to amount, if the collector of internal revenue by whom such tax was collected is dead or out of office. Such authority to sue the United States must be liberally construed. *United States v. Shaw,* 309 U. S. 495; *United States* v. *Emory, Bird, Thayer Realty Co.,* 237 U. S. 28, 32.

IV.

Other Cases Relied on by Petitioner Distinguished or Discussed.

Some of the cases cited by petitioner have been cited or discussed in previous portions of this brief. To preserve the continuity of the argument, a number of petitioner's citations were omitted, and some of them will be taken up here.

On page 12 of its brief petitioner cites *United States* v. *Michel,* 282 U. S. 656. That case has no bearing whatever on our case. The suit was not upon an allowed claim. No certificate of overassessment had been issued by the Commissioner. The claim had been rejected, but the Commissioner had failed to give the taxpayer notice of rejection until more than two years after the actual rejection. The suit was commenced within two years after the taxpayer received notice of the rejection, but much more than two years after the rejection of the claim. This Court held that the failure to give notice of rejection did not extend the time to commence suit, and that the suit was not timely commenced within them two years after the rejection of the claim.

In subdivision 2 of Point I on pages 12 to 14 of its brief, the petitioner argues that the decision, upon the first ap-

peal herein to the Court below, may have been the law of the case in the Court below, but is not the law of the case in this Court. Respondent does not dispute this argument.

In subdivision 3 of Point I on pages 14 to 20 of its brief, the petitioner disagrees with the reasoning in the prevailing opinion upon the first appeal to the Court below. Respondent, in its brief and argument on that appeal, did not urge the reasons stated in the prevailing opinion, and does not urge those reasons in its present argument before this Court, but contends that the decision of the Court below, upon the first appeal herein, arrived at a sound conclusion.

Respondent likewise disagrees with the effect of some of the cases cited in that subdivision of petitioner's brief. A discussion of some of these citations will suffice.

Stearns Co. v. *United States*, 291 U. S. 54, cited on page 18, did not involve a question of an allowed claim. On the contrary, this Court held there that the taxpayer had requested that a deficiency for another year be held open by the Commissioner and that the overassessment be credited to that deficiency.

Daube v. *United States*, 289 U. S. 367, cited on page 18, was distinguished in its decision from the *Bonwit Teller* case. In the *Daube* case, the Commissioner changed his finding before he delivered a certificate of overassessment. On pages 21-22 and 24-25 of its brief herein, the petition quotes two extracts from the opinion of Mr. Justice Cardozo in the *Daube* case. The quotation on pages 21-22 shows that Mr. Justice Cardozo approved the *Bonwit Teller* case, and in citing it said "The statement of an account gives rise to a new cause of action with a new term of limitation." In the quotation on pages 24-25, Mr. Justice Cardozo did not say that the *Bonwit Teller* case went too far, but said that "in the *Bonwit Teller* case a specific

limitation applicable to claims for the recovery of taxes is set aside and superceded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid." Mr. Justice Cardozo conceded that in the *Bonwit Teller* case the inference of an agreement was sustained by the issuance of a certificate of overassessment. In the *Daube* case, as explained by Mr. Justice Cardozo, the Commissioner had placed the overassessment on a schedule, but had cancelled it before delivering a certificate of overassessment, and never delivered the certificate to the taxpayer, and to this type of case in which no certificate of overassessment was ever delivered, Mr. Justice Cardozo said, the ruling of the *Bonwit Teller* case should not be extended "through an enlargement of the concept of an account stated by latitudinarian construction."

United States v. *Chicago Golf Club,* 84 F. (2d) 914; *Savannah Bank & Trust Co.* v. *United States,* 58 F. (2d) 1068, and *Phoenix State Bank & Trust Co.* v. *Bitgood,* 28 F. (2d) 899, cited on page 18 of petitioner's brief, were all cases which did not involve a certificate of overassessment and therefore have no bearing on the rule in the *Bonwit Teller* case.

On page 23 of its brief, petitioner relies on the case of *Marks* v. *United States,* 98 F. (2d) 564 upon the proposition that a certificate of overassessment, which contains a statement that part of the overpayment was barred by the statute of limitations, will not support a suit on an account stated. This case, decided by the Circuit Court of Appeals for the Second Circuit, is in conflict with the four Court of Claims decisions in the cases of *Wood* v. *United States,* 17 F. Supp. 521; *Clifton Mfg. Co.* v. *United States,* 19 F. Supp. 723; *Goodenough* v. *United States,* 19 F. Supp. 254, and *Blue Jay Lumber Co.* v. *United States,* 27 F. Supp. 707. It is respectfully submitted that the Court of Claims decisions are correct, and that the *Marks* case is in error.

On page 26 of its brief, petitioner relies on *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. This case is entirely irrelevant. It involved an action brought for a refund of a tax paid by credit of an overassessment for another year. The suit was for the year to which the credit was applied and not the year out of which the credit arose. In that case the District Court had no jurisdiction because the taxpayer could not sustain the statutory jurisdictional allegation that the Collector by whom the tax was collected was dead or not in office. No Collector had ever collected that tax. The tax was not paid in cash by the taxpayer to the Collector but was paid by credit of an overassessment for another year. The credit was collected directly by the Commissioner from the Treasury, and did not pass through the hands of the Collector. The *Lowe Bros. Co.* case was distinguished by this Court in *United States* v. *Bertelsen & Petersen Eng. Co.,* 306 U. S. 276.

The distinction between the *Lowe Bros. Co.* case, and a case in which the tax had been collected by a Collector was even recognized by the Circuit Court of Appeals for the Second Circuit, in the case of *Gans Steamship Line* v. *United States,* 105 F. (2d) 955, 956, where that Court said:

> "This action seeks recovery of taxes illegally collected for the year 1917—not 1919 (the year to which the 1917 overpayments was credited)."

The *Otis Elevator Co.* v. *United States,* 18 F. Supp. 87, cited by petitioner on page 27 of its brief, was decided by the District Court for the Southern District of New York, and followed the decision of its Circuit Court in the case of *Moses* v. *United States,* 61 F. (2d) 791, which has been previously fully discussed in this brief.

Dubiske v. *United States,* 98 F. (2d) 361, cited by petitioner on page 34 of its brief herein, is not applicable to our case. In the *Dubiske* case, the Court held that the tax-

payer did not file a waiver on or before June 15, 1925, and therefore did not come within the provisions of Sec. 284(g) of the Revenue Act of 1926. The Court also said that it was necessary to file a claim for refund before April 1, 1926. This statement did not necessarily exclude the right to file the claim for refund within four years after the tax was paid, because that issue was not before the Court, as the decision hinged on the taxpayer's failure to file a waiver. If that Court intended to follow the rule of *Weinberg* v. *United States,* 25 F. Supp. 83, to the effect that the April 1st date is the only effective branch of the alternative provided in Sec. 284(g), then it is respectfully submitted that the Court erred.

Brewer v. *Nat'l Life & Acc. Ins. Co.* (C. C. A. 6th) decided April 17, 1941 and printed in 414 C. C. H. par. 9399, is cited by petitioner on page 39 of its brief. This case is in direct conflict with the decision herein of the Court below. It held to the same effect as *Weinburg* v. *United States,* 25 F. Supp. 83, and also held that the rule of *Hills* v. *United States,* 50 F. (2d) 302 did not apply to refunds of income taxes. It is respectfully submitted that the *Brewer* case is not a well considered decision, and particularly errs in citing and relying on *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. The *Garbutt* case involved the validity of an amendment of a claim for refund and was in no way concerned with Sec. 284(g) of the Revenue Act of 1926, and was therefore not an authority for the decision in the *Brewer* case. In the *Garbutt Oil Co.* case the suit was brought to recover only the overpayment made on April 3, 1925, and no previous payments were under consideration.

V.

CONCLUSION.

The claim for refund herein was timely filed, and having been filed pursuant to the provisions of Sec. 284(g) of the Revenue Act of 1926 it permitted the recovery of the over-payment of 1920 tax paid by respondent in 1921. This suit was timely commenced within six years after the claim for refund was allowed, and the District Court had jurisdiction hereof.

The judgment of the Court below should be affirmed.

Respectfully submitted,

DONALD HORNE,
Attorney for Respondent.

ALEXANDER LEVENE,
of Counsel.

May, 1941.

Appendix.

Section 3228 of the Revised Statutes, as Amended by Sec. 1316 of the Revenue Act of 1921.

Sec. 1316. That Section 3228 of the Revised Statutes is amended to read as follows:

"Sec. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by Section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 314.

Section 252 of the Revenue Act of 1921.

Refunds

Sec. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Rev-

enue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of Section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under Section 252, of the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 268.

Act of March 4, 1923, Amending Sec. 252 of the Revenue Act of 1921.

That Section 252 of the Revenue Act of 1921 is amended to read as follows:

"Sec. 252(a) * * * *Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, such credit or refund shall be allowed or made if claim therefor is filed either within six years from the time the return for such taxable year 1917 was due or within two years from the time the tax was paid. * * *"

Chap. 276, 42 Stat. 1504, 1505.

Act of March 13, 1924, Amending Sec. 252 of the Revenue Act of 1921, as Amended.

That the second proviso of subdivision (a) of Section 252 of the Revenue Act of 1921 as amended by the Act entitled "An Act to amend the Revenue Act of 1921 in respect to credits and refunds," approved March 4, 1923, is amended to read as follows: "*Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within two years from the time the tax was paid."

Chap. 55, 43 Stat. 22.

Section 281 of the Revenue Act of 1924.

CREDITS AND REFUNDS.

Sec. 281(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed

such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

(f) * * * * *

Chap. 234, 43 Stat. 253, 301, 302.

Act of March 3, 1925, Amending Sec. 281 (e) of the Revenue Act of 1924.

That subdivision (e) of Section 281 of the Revenue Act of 1924 is amended by adding thereto two new sentences to read as follows: "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919, shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

Chap. 435, 43 Stat. 1115.

Section 284 of the Revenue Act of 1926.

CREDITS AND REFUNDS

SEC. 284(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) * * * * *

(f) * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefore is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on

or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

(h) * * * * *

Chap. 27, 44 Stat. 9, 66-68.

Section 3226 of the Revised Statutes, as Amended by Sec. 1014, of the Revenue Act of 1924.

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to

which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Chap. 234, 43 Stat. 253.

Section 1059 of the Revised Statutes.

Sec. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

Section 1069 of the Revised Statutes.

Sec. 1069. Every claim against the United States, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues. * * *

Tucker Act.

An act to provide for the bringing of suits against the Government of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First: All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

Second: All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

Sec. 2: That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claims exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried by the court without a jury.

* * * * *

Sec. 16. That all laws and parts of laws inconsistent with this act are hereby repealed.

Approved, March 3, 1887.

Chap. 359, 24 Stat. 505.

Judicial Code, Jurisdiction of and Statute of Limitations in Court of Claims.

Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First: All claims (except for pensions) founded the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: * * *

Second: All setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *

* * * * *

Sec. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: * * *

Chap. 231, 36 Stat. 1087, 1136-7, 1139.

Judicial Code, Jurisdiction of District Courts.

Sec. 24. Original jurisdiction. The district court shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *; *And provided further,* That no suit against the Government of the United States shall be allowed under this section unless the same has been brought within six years after the right accrued for which the claim is made.

Chap. 231, 36 Stat. 1087, 1093.

United States Code of Laws—Jurisdiction of and Statute of Limitations in Court of Claims.

Sec. 250. (Judicial Code, section 145.) Jurisdiction. The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation

of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

(2) *Set-Offs.*—Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *

* * * * *

Sec. 262. (Judicial Code, section 156.) Claims to be filed within six years. Every claim agains' the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. * * *

U. S. C., Title 28, Secs. 250, 262.

United States Code of Laws—Jurisdiction of District Courts.

Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * * * *

(20) *Suits against United States.*—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or

implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *

U. S. C., Title 28, Sec. 41, par. 20.

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SUPREME COURT OF THE UNITED STATES.

No. 853.—October Term, 1940.

The United States of America, Petitioner, *vs.* The A. S. Kreider Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 26, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

In 1921, respondent filed its income tax return for 1920, disclosing tax liability of $52,481.97 which it paid in full. Thereafter, and prior to June 15, 1926, it executed a waiver extending until December 31, 1926, the time for audit and possible additional assessment of taxes. On July 26, 1926, respondent paid a deficiency assessment of $1,362.50. Almost three years later, on March 23, 1929, respondent filed a claim for refund of $53,844.47, the entire amount of taxes paid for 1920.

The Commissioner found that respondent had overpaid its 1920 taxes in the sum of $14,833.68. In October, 1929, he sent respondent a certificate of overassessment which noted that there had been an overpayment in that amount but that $13,471.18 was "barred by statute of limitations". Accompanying the certificate was a check for the difference, $1,362.50, which respondent apparently accepted. In thus computing the refund owing to respondent, the Commssioner assumed that subsections (b)(1), (b)(2), and (g) of § 284[1] of the Revenue Act of 1926 (44 Stat. 9, 66, 67) authorized him to remit only that part of the 1920 tax which was paid in 1926.

On March 7, 1932, respondent brought the present action in a United States District Court to recover the sum withheld. At the close of the trial, petitioner moved for judgment on the ground that the action was barred by § 1113(a) of the Revenue Act of 1926 (44 Stat. 9, 116). The District Court granted the motion and entered judgment for petitioner. 30 F. Supp. 722. The Circuit

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1 Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed [by specified Acts], the amount of such overpayment shall [subject to enumerated conditions] be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions . . . (g) of this section—

(1) No such credit or refund shall be allowed or made after . . . four years from the time the tax was paid in the case of a tax imposed by any

Court of Appeals reversed, one judge dissenting, holding that the general six-year limitation in § 24(20) of the Judicial Code [28 U. S. C. § 41(20)] rather than the limitations in § 1113(a) determined the timeliness of respondent's action. 97 F. (2d) 387.

The cause was returned to the District Court. Over the renewed contention of petitioner that the action was barred by § 1113(a), the District Court proceeded to the merits. It held, in effect, that § 284(b)(2) did not limit the refund sanctioned by § 284(g) to the portion of the tax paid within four years of respondent's claim, and entered judgment as prayed in the complaint. 30 F. Supp. 724. The Circuit Court of Appeals affirmed, accepting as the law of the case its earlier decision that the action was timely, despite petitioner's argument to the contrary. 117 F. (2d) 133. On April 14, 1941, we granted certiorari. — U. S. —.

Relying principally on *Bonwit-Teller & Co.* v. *United States,* 283 U. S. 258, respondent maintains that its action was commenced well within the applicable period of limitation. Further, respondent contends that both courts below correctly refused to regard § 284(b)(2) as a limitation on the Commissioner's duty to make refunds under § 284(g). We find it unnecessary to examine the latter contention, for we are of opinion that respondent sued too late.

Insofar as material here, § 1113(a) provides: " . . . No [suit or proceeding for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected] shall be begun . . . after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

Undoubtedly, respondent has failed to begin its action within either of the periods specified in § 1113(a). See *United States* v. *A. S. Kreider Co.,* 97 F. (2d) 387, 388. The suit was not instituted until March 7, 1932, although the last tax payment was made on July 26, 1926, and the claim for refund was disallowed in

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prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the . . . four years . . . immediately preceding the filing of the claim. . . .

(g) . . . If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. . . .

October, 1929.[2] But as already stated, the court below held that the action was not barred because the Tucker Act (24 Stat. 505), later incorporated in § 24(20) of the Judicial Code, rather than § 1113(a) prescribed the period within which respondent was bound to bring suit. We view the statutes differently.

Section 24(20) gives the district courts jurisdiction concurrent with the court of claims of certain suits against the United States. To equate the right thus conferred to the existing right to sue in the court of claims (see 28 U. S. C. § 262), the statute provides: "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made."

We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment. See *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326, 332-333.

Section 1113(a) is precisely that type of provision. Recognizing that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws, Congress allowed only five years from payment of the tax for the commencement of such actions, unless specified circumstances extended the period. That this specific provision is entirely consistent with the general provision in § 24(20) is plain. Indeed, the limitation in § 1113(a) has no meaning whatever unless the limitation in § 24(20) is construed not to govern proceedings for the recovery

[2] It should be noted that this action seeks recovery of money which was paid in 1921. We assume, so far as this decision is concerned, that the phrase "such tax" in the quoted language refers to the total tax for the year in question whenever determined and assessed; or stated differently, that "payment" within the meaning of this statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later. Compare Union Trust Co. *v.* United States, 70 F. (2d) 629.

We assume also that the Commissioner's refusal in 1929 to make the refund was a "disallowance" of respondent's claim. Compare Bonwit-Teller & Co. *v.* United States, 283 U. S. 258, 265, with United States *v.* Bertelsen & Petersen Engineering Co., 306 U. S. 276, 280.

of "internal-revenue tax alleged to have been erroneously or illegally assessed or collected".[3]

Bonwit-Teller & Co. v. *United States, supra,* does not remove the bar of § 1113(a) here. There we held under the peculiar facts disclosed that the taxpayer could evade the limitations of that section by grounding its action on a subsequent "account stated" rather than on the original, wrongful overassessment. But the instant case is plainly distinguishable, for, assuming that familiar doctrines of contracts furnish the test (*Daube* v. *United States,* 289 U. S. 367, 370), we are unable to find the requisites of an account stated in the transactions on which respondent relies.

To establish an account stated, respondent must show that a balance was struck "in such circumstances as to import a promise of payment on the one side and acceptance on the other". *R. H. Stearns Co.* v. *United States,* 291 U. S. 54, 65; see also, *Toland* v. *Sprague,* 12 Pet. 300, 325; *Nutt* v. *United States,* 125 U. S. 650. But plainly, "no such promise is a just or reasonable inference from the certificate of overassessment delivered to this taxpayer, if the certificate is interpreted in the setting of the occasion." *R. H. Stearns Co.* v. *United States, supra.* In fact, a contrary inference is the only legitimate supposition respondent could make. At most, respondent could assume that the United States promised to pay $1,362.50; the check was there in fulfillment. Obviously, refusal to refund the balance did not and could not imply a promise to pay the amount withheld.

Acceptance by respondent, another essential of an account stated, is equally lacking. By accepting the check for $1,362.50 respondent agreed only to a partial account stated (compare *Sturm* v. *Boker,* 150 U. S. 312, 340), thereby converting that much of the statement into an account settled. The institution of this suit is ample proof that respondent never intended to accept the certificate in its entirety as a correct computation of the amount which it claimed was due.

We conclude that respondent's suit is barred by the limitations of § 1113(a). The judgment is reversed, and the cause is remanded with directions to dismiss the petition.

It is so ordered.

[3] Apparently the applicability of a specific limitation instead of the general Tucker Act limitation has not been challenged for 35 years. See Christie-Street Commission Co. *v.* United States, 136 Fed. 326. The specific limitation has been assumed to apply in numerous cases. See, e. g., United States *v.* Bertelsen & Petersen Engineering Co., 306 U. S. 276; Bates Mfg. Co. *v.* United States, 303 U. S. 567; R. H. Stearns Co. *v.* United States, 291 U. S. 54; Daube *v.* United States, 289 U. S. 367.